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THE INTERNATIONAL ENFORCEMENT OF MAINTENANCE ORDERS [1]

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'Maintenance' is a word which has many meanings in the language of our law, but when we speak of a 'maintenance order' the reference is to an order of a court of justice directing sums of money to be paid periodically for the support of the spouse, parent, child or other relation (including an illegitimate child of the person against whom the order is made).[2] These orders are based on a duty which in the countries of the civil law is known as an 'alimentary obligation'.[3] For our present purpose I propose to distinguish between 'maintenance' and 'alimony', a word which also connotes the existence of a duty to provide for the needs of another person but is employed in a special sense to describe the payments made by a husband to his wife by order of the court in a suit for divorce or separation. Orders of this description could be treated as falling within the category of maintenance orders, but I

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2 Cf. the definition in s. 10 of the Maintenance Orders (Facilities for Enforcement) Act, 1920.

3 The *Vocabulaire Juridique* defines 'obligation alimentaire' as follows: 'une obligation que la loi impose à certaines personnes de fournir à d'autres les ressources nécessaires à la vie'.

shall refrain from doing so because they are so closely bound up with proceedings in the divorce courts that to import them into our discussion would not only complicate the question, but might also tend to obscure other and more important issues.

Where private international law is concerned maintenance orders are to be regarded as 'judgments' although they differ from judgments of the usual type because they direct money to be paid at stated intervals and because they are subject to variation from time to time if, owing to a change in the circumstances of the judgment debtor, or for some other reason, it is no longer just that he should be required to pay the amount originally awarded. The question of the enforcement in one country of maintenance orders made by the courts of another country is, therefore, from the point of view of private international law, a particular aspect of a wider problem, namely, that of the enforcement of foreign judgments in general.

The learned author of a recent treatise on private international law has said that, in his view, 'of all the problems arising in international intercourse the problem of the recognition of foreign judgments and of their enforcement in other countries is probably the most important'. He points out that this has always been so where foreign trade is concerned, on account of the inconvenience, uncertainty and expense of litigation in a foreign country, but that the recognition of foreign judgments has become increasingly important during the last century 'for social and political reasons' such as the movement on a very large scale of populations from one country to another. As an example he refers to decisions in matrimonial suits which, as he points out, 'have become of overwhelming importance'.[4]

Almost equally important is the problem now before us, namely, the situation which arises when a person who is responsible for the support of a dependant relative seeks to evade his liabilities by taking refuge in another country where, as the law now stands, it will, in practice, be impossible to enforce his obligations against him. The issues involved in this problem are not merely of technical legal interest.[5] There is a humanitarian side to them because, from the very nature of the case, they affect the welfare of persons who are either unable to take steps for their own protection or are without the necessary means to do so. The existing machinery provided by the rules of private international law to deal with conflicts of jurisdiction and, more especially, with the recognition of foreign judgments has failed to provide any adequate

[4] Wolff, *Private International Law*, p. 252.
[5] See the speech of Lord Blackburn in *Berkley* v. *Thompson* (1884), 10 A.C. p. 45.

remedy for the grievances of such persons. One need not be surprised that methods designed to enforce payment of large sums of money in respect of commercial transactions have proved to be wholly unsuited to the recovery of small sums due periodically from persons resident abroad. The enforcement of maintenance orders calls for procedure which is simple, inexpensive and rapid in its operation. The courts entrusted with the duty of enforcing foreign maintenance orders are, as a general rule, courts of inferior jurisdiction, with laymen as judges, who should not be required to deal with difficult questions of private international law or to unravel the network of technicalities in which the law relating to the enforcement of foreign judgments has become entangled. That the present state of the law leads to hardship is undoubted. The matter was raised recently in the House of Commons in relation to the liabilities of foreign soldiers stationed in England during the war. In many instances these men returned home leaving dependant wives and children, either legitimate or illegitimate, in this country. Questions were put to the Minister of State with regard to claims which had arisen in this connection against members of the Canadian and United States forces. In reply it was said that, as a matter of international courtesy, arrangements had been made for the deduction in such cases of the necessary amounts from service pay and allowances so long as the men concerned were with the colours, but that apart from this nothing could be done. It was stressed that maintenance or affiliation orders made by British courts could not be enforced in the United States. As regards Canada it was pointed out that the scheme for the reciprocal enforcement of maintenance orders within the British Commonwealth contained in the Maintenance Orders (Facilities for Enforcement) Act, 1920,[6] only applied to Alberta, British Columbia, Manitoba and Saskatchewan and not to the other Canadian provinces. Moreover, affiliation orders are not covered by the Act and cannot, therefore, be enforced anywhere in Canada.[7]

The British Act of 1920 represents the high-water mark of international collaboration in the enforcement of these orders. Its scope can be inferred from its title which is: 'An Act to facilitate the enforcement in England and Ireland of Maintenance Orders made in other parts of His Majesty's Dominions and Protectorates and vice versa'. Section 12 of the Act provides that it may be extended by Order in Council to such parts of the British Commonwealth as may make provision for the reciprocal enforcement of orders made by an English court. The Act has been applied to

[6] 23 Geo. 5, c. 13.
[7] See *Law Journal Newspaper*, Vol. 98, p. 90.

most parts of the Commonwealth, the principal exceptions being Scotland, Eire and the Canadian provinces of Quebec and Ontario.[8] English courts of summary jurisdiction are given power (except in affiliation proceedings) to make provisional orders *in absentia* against persons resident in other parts of the Commonwealth and to confirm and enforce similar orders made by Commonwealth courts against persons resident in England. All orders made by virtue of the Act are to be regarded as provisional until confirmed by the court called on for enforcement. The court applied to for enforcement may give effect to the provisional order as it stands, or may modify or vary it on cause being shown. The provisional order is, in the first instance, forwarded to a court of the country in which the respondent resides, together with the depositions and a statement of the grounds on which the respondent could have opposed the making of the order if he had appeared at the hearing. In addition, it is open to the respondent to raise the question of the jurisdiction of the court to make the order, even though this may not have been included as a ground of defence in the statement accompanying the provisional order.[9] He may not apply to have the order rescinded or varied merely because it is one which an English court could not have made. He must show cause and submit evidence in support of his application.[10]

The outstanding feature of the scheme for reciprocity which is embodied in the British Act of 1920, is that it enables proceedings to recover maintenance to be instituted in the courts of the country in which the claimant resides and gives power to those courts to make an order without any need for the appearance of the respondent. The order so made can be challenged by the respondent, but the onus is placed on him to show cause why it should not be enforced against him by a court in the country to which he has fled to escape his responsibilities. It is possible by this method

[8] So far as Scotland is concerned the position cannot be regarded as satisfactory. Reciprocity exists on paper but, in practice, it only functions where the respondent was within the jurisdiction of the court making the maintenance order at the time when the order was made, *i.e.*, was domiciled, ordinarily resident or (perhaps) merely present in the area of the court at that time. Summary Jurisdiction (Process) Act, 1881, s. 6; Summary Jurisdiction (Married Women) Act, 1895, s. 4; *Berkley* v. *Thompson* (1884), 10 A.C. 45; *McQueen* v. *McQueen* 1920 2 S.L.T. 405; *Forsyth* v. *Forsyth*, [1947] 2 All E.R. 623. In reply to a question in the House of Commons on April 13, 1948, the Secretary of State for Scotland announced that he was considering the possibility of further legislation in conjunction with the Home Secretary. The relevant Orders in Council extending the operation of the Act of 1920 to the British Commonwealth are enumerated in *Stone's Justice's Manual* (1947 ed.), at p. 1015.

[9] *Re Wheat*, [1932] 2 K.B. 716. As to appeals from orders of confirmation, see *Hague* v. *Hague*, [1937] 2 All E.R. 539.

[10] *Peagram* v. *Peagram*, [1926] 2 K.B. 165. See s. 3 of the Maintenance Orders (Facilities for Enforcement) Act, 1920.

of procedure to avoid any difficult questions of private international law and to relieve claimants from the uncertainty, delay and prohibitive expense involved in the institution of proceedings in a foreign country. Orders when confirmed can be varied or modified by the courts charged with enforcement if there has been a change of circumstances which renders this necessary. On the other hand, the defect of the scheme is that it makes no provision for the enforcement of affiliation orders, which is perhaps the most important factor in the present situation.

A measure for the establishment of reciprocity which has been very successful is the Convention of Oslo, 1931, concluded between the five Nordic countries, *i.e.*, Denmark, Finland, Iceland, Norway and Sweden. This Convention applies not only to maintenance orders in the strict sense of that term but extends to any order of a judicial or administrative authority directing payments to be made for the support of the relatives named in the Convention, *i.e.*, spouses, legitimate and illegitimate children and sons- and daughters-in-law. It also applies to agreements in writing entered into for the same purpose. The most interesting feature of this Convention is a special provision relating to affiliation orders made in default of appearance. This illustrates the extreme difficulty which is encountered when it is sought to secure reciprocity in the case of these orders and will be referred to hereafter.[11]

The next stage in the search for an international solution of our problem was an attempt to establish a scheme for international enforcement under the ægis of the League of Nations. The question was first brought to the notice of the League by the ' Migration Service ', an international body charged with the protection of the interests of emigrants, and by the ' Committee for Child Welfare ', which was one of the subsidiary organs of the League. The ' Migration Service ' was moved to take action because of the situation which arises when a breadwinner emigrates but does not take his family with him. In such cases he often fails to contribute towards the support of his dependants, who become a charge on the community and are debarred by the existing state of the law from taking any steps to enforce their right to maintenance. The ' Committee for Child Welfare ' was chiefly concerned with the plight of illegitimate children and their mothers who have been abandoned by a putative father who has sought refuge beyond the jurisdiction. A legal subcommittee appointed by this organisation prepared a draft convention, but this has remained a dead letter because in 1929 the Council of the League decided to refer the whole matter

[11] See *post*, p. 172.

to the Rome Institute for the Unification of Private Law, with instructions to investigate the problem and to report back to the Council. The Rome Institute, which was also one of the subsidiary organs of the League, appointed a committee of legal experts to make a report and, if it saw fit, to prepare a draft convention. The members of this committee were Signor d'Amelio, President of the Italian Court of Cassation (Chairman), M. Basdevant, now a judge of the International Court at the Hague, Professors Borchard and Deák, of Columbia University, New York, Professor Sauser Hall and M. Gorgé (Switzerland), Dr. Ficker of the German Foreign Office, Professor Perassi (University of Rome), Dr. Meyer, President of the Supreme Court of Denmark, M. Hennebicq (Belgium), Mlle. de Steller, of the Secretariat of the League of Nations, and the writer. A considerable amount of preliminary comparative research was carried out by the staff of the Rome Institute but the results of this have not been published; with the exception of a brochure entitled '*L'Exécution à l'Étranger des Obligations Alimentaires*' which contains a very useful collection of the various conventions, mostly bilateral, which have been concluded with a view to the reciprocal enforcement of foreign judgments. The Committee of Experts appointed by the Institute held two meetings, the first at Brussels in 1937 and the second at Santa Margherita Liguori in 1938. A provisional draft convention was prepared but the work of the Committee was broken off owing to the outbreak of war and has not been resumed. The direct contribution made by the labours of this Committee to a solution of the problem of the international enforcement of maintenance orders is, therefore, of a somewhat slender character, though indirectly the appointment of the Committee has done a good deal to clarify the present position and to indicate the directions in which some measure of common action to enforce maintenance orders may possibly be found at a later date.

The background against which our problem must be considered is that of the deplorable state of the rules of private international law dealing with conflicts of law and jurisdiction in the case of alimentary obligations. Dr. Rabel, in a very searching study of the comparative aspects of this branch of family law, refers to the existing rules of conflict as plunged 'in utter confusion'.[12] Dr. Martin Wolff has described the position in these words: 'Every imaginable point of contact has been recommended by legal writers, considered by courts and introduced into modern codes'. He says that the problem is in fact 'one of the most discussed questions in private international law'.[13]

[12] Rabel, *Conflict of Laws*, p. 614.
[13] Wolff, *Private International Law*, p. 411.

For our present purpose it is fortunately unnecessary to consider in detail all the differences which exist between the rules of the various systems of law relating to the duty of maintenance and support, because we are concerned with a question of the reciprocal enforcement of judgments rather than with a comparative study of the rules of law upon which those judgments have been founded. All systems are in agreement in treating the alimentary obligation as one which is founded on moral and humanitarian considerations of the highest order. Blackstone regards it as 'flowing from the law of nature'.[14] Cardozo also treats it as a natural obligation which 'has its origin in the protection that is due to the incompetent and the helpless'.[15] But owing to the historical development of the law and to other causes, the nature and extent of the obligation and the manner in which it can be enforced vary considerably from country to country. It would be out of place here and also unprofitable to attempt an enumeration of the differences which exist, for this is a task which has been carried out elsewhere.[16] But it may serve a useful purpose to indicate certain divergences which illustrate the nature of the obstacles encountered in any attempt to establish a scheme of international reciprocity in this matter.

There is, to begin with, no general consensus either as to the persons entitled to maintenance or as to the persons who are under an obligation to furnish it. All systems of law appear to be in agreement as to the duty of a husband to support his wife and his legitimate children, but beyond this point there is confusion. Our own law, for example, is peculiar in that it holds a grandparent liable to support his grandchildren without imposing any corresponding liability on the grandchildren.[17] With certain limitations there is, according to French law, a duty to support parents-in-law and sons- and daughters-in-law.[18] In the law of Switzerland the duty of support may extend to brothers and sisters if they become destitute without such assistance.[19] It would seem that in Dutch law the duty to pay compensation to a workman injured by an industrial accident is classified as an alimentary

[14] 1 Bl.Com. 456.
[15] *Finlay* v. *Finlay* (1925), 240 N.Y. at p. 431. Cited by Kuhn, *Comparative Commentaries on Private International Law*, p. 195.
[16] For detailed comparative studies of this topic, see Rabel, *op. cit.*; Schlegelberger, *Rechtsvergleichendes Handwörterbuch*, Vol. 4 (Kindschaftsrecht), Vol. 6 (Uneheliche Kinder). Tomforde, *Das Recht des unehelichen Kindes*; Burge, *Foreign and Colonial Law* (2nd ed.), Vol. 2, Chap. 9. For the law in the United States, see Vernier, *American Family Laws* (1931–1938).
[17] *R.* v. *Cornish* (1831), 2 B. & Ad. 498; *Maund* v. *Mason* (1874), L.R. 9 Q.B. 254.
[18] Code Civil, art. 206, as amended by the Law of August 19, 1919.
[19] Civil Code, art. 329.

obligation.[20] For the most part the duty of support takes the form of an obligation to pay sums of money at stated intervals, but in some systems the person who is liable to support a relative may in certain circumstances be required to receive him or her into his home or to provide sustenance in kind.[21] The period of duration of the duty of support also varies and may even extend to the lifetime of the beneficiary.[22] More important, however, for our purposes, is the fact that the terms 'maintenance order' and 'alimentary obligation' may include the enforcement of liabilities arising otherwise than by the order of a court of justice. Thus, in Denmark, for example, maintenance orders are made by a government official and not by the courts,[23] and in some systems of law execution can issue, without the intervention of a court of justice, if default is made in the payment of aliment due under a so-called *acte authentique exécutoire*, *i.e.*, a notarial contract containing the *formule exécutoire* by which the debtor agrees that execution may issue against him forthwith if he is in default.[24] Readers of Pickwick will remember that it was on an undertaking of this kind known as a *cognovit actionem* that Mrs. Bardell was committed to the Fleet Prison at the instance of Dodson and Fogg.

The thorny question of reciprocity in the case of affiliation orders is perhaps the most difficult and delicate of all the problems which have to be faced if international collaboration is to be realised in the domain of family law. For this reason it would seem to be desirable to devote special attention to it and to consider it apart from the general situation which has been outlined.

In our English law the liability of the parent to support an illegitimate child rests on statute and forms part of the machinery of the Poor Law. The underlying idea is to ensure that the expense of supporting the child shall not be a public charge. This is also the position in other common law jurisdictions, with certain exceptions.[25] The laws of Alaska, Texas and Virginia do not recognise any liability on the father to support his illegitimate child. In some States (Idaho, Massachusetts and Pennsylvania) affiliation proceedings are treated as criminal in nature; in others they are regarded

[20] *Ex relatione*, Dr. J. Kosters, Minutes of the Brussels Session of the Committee of the Rome Institute.

[21] See, for instance, German Civil Code, arts. 1360 and 1361; Schuster, *German Civil Law*, p. 494.

[22] See *Re Macartney*, [1921] 1 Ch. 522.

[23] *Ex relatione*, Dr. Meyer, Minutes of the Brussels Session of the Committee of the Rome Institute.

[24] See Walton and Amos, *Introduction to French Law*, p. 21.

[25] See Eversley, *Domestic Relations* (5th ed.), p. 512; Halsbury, *Laws of England* (Hailsham ed.), Vol. 2, 'Bastardy', Parts 5 and 6, pp. 574 *et seq.* As to the very complicated position which exists in the British Commonwealth, see Burge, *op. cit.*, Chap. 9, which is generally speaking accurate but states the law as it was in 1908 and must therefore be used with caution.

as civil actions but they represent the exercise of the police power of the State to prevent the child from becoming a burden on the community. It follows that no action can be brought in State A on the Bastardy Laws of State B, but if a judgment has been given in favour of a private individual it can be enforced in other States under the full faith and credit clause of the federal constitution.[26]

The power of an English court to make an affiliation order is strictly limited. If the mother is domiciled in a foreign country and the child was born abroad no order can be made even though the father is resident in England and the mother has brought the child to this country.[27] So also no order can be made if the father is resident elsewhere than in England or Wales, even if the mother is resident here, unless he was within the jurisdiction when the process of the court was issued and served on him. It would seem that mere casual presence will suffice for this purpose. The fact that the father has appeared in the proceedings in England is immaterial because the principle of jurisdiction based on submission does not apply to the case of a court of inferior jurisdiction the powers of which are fixed by statute.[28]

In France and in those countries whose law is based on that of France an illegitimate child is not entitled to maintenance until he has been acknowledged by his father and mother. This acknowledgment may be voluntary (*reconnaissance volontaire*), in which case it must be made either in open court or by notarial act. It may also form the subject-matter of legal proceedings (*reconnaissance judiciaire*) by or on behalf of the child which are subject to certain very rigid conditions and restrictions too detailed to be set out here.[29] If the child is successful in the proceedings he obtains the status of a recognised illegitimate child, which gives him the right to use his father's name and also to maintenance and to a share in the estate of his father. Unless all the formalities prescribed for recognition are complied with the child obtains no right to maintenance in France, though in certain countries[30] which follow

[26] Vernier, *American Family Laws*, Vol. 4, p. 207, and Table 119; the American *Restatement of the Conflict of Laws*, § 443, comment (b) § 454 and § 610, comment (d). The constitutionality of the Idaho statute in creating a criminal offence was challenged in *State* v. *Wilmot*, 51 Ida. 233, cited by Vernier, *supra*, Supplement, p. 115. The Uniform Illegitimacy Act, 1933, which had been adopted by seven States up to 1938 allows a judgment of the courts of State A to be enforced in State B so far as 'it is not inconsistent with the laws of State B'.

[27] *R.* v. *Blane* (1849), 13 Q.B. 769. If the parents are ordinarily domiciled in England the court will have jurisdiction. *Sed quære* whether the mother must not be a British subject. *R.* v. *Humphrys*, [1914] 3 K.B. at p. 1240.

[28] *Forsyth* v. *Forsyth*, [1947] 2 All E.R. 623; *McQueen* v. *McQueen* 1920 2 S.L.T. 40; *Berkley* v. *Thompson* (1884), 10 A.C. 45.

[29] Code Civil, art. 340, as amended by the Law of November 16, 1912; Tomforde, *op. cit.*, p. 52; Burge, *op. cit.*, Vol. 2, p. 559.

[30] Belgium, Greece, Netherlands, Switzerland.

French law he can if recognised informally claim maintenance but not the other privileges granted to a recognised illegitimate child. The legal systems which belong to what is sometimes described as the Central European Group (Germany, Austria, Poland, Czecho-Slovakia) and the legal systems of the five Nordic countries do not draw any such distinction between recognised and unrecognised children, with the exception of Swedish law which confers certain advantages on a ' trolovningsbarn ', *i.e.*, the offspring of a betrothed couple.[31] In all these systems the illegitimate child does not become a member of his father's or his mother's families and his right to maintenance is founded on the fact that he is the offspring of the extra-matrimonial intercourse of his parents.

It will be clear from this brief and, I fear, somewhat imperfect survey of the comparative aspects of the law relating to the alimentary obligation that there is a serious state of conflict. If we turn to the rules of private international law which control the choice of law in cases of this kind we meet once again with confusion and uncertainty. So far as husband and wife [32] and parents and their legitimate children [33] are concerned, the prevailing opinion seems to be that the law of the husband or father should be applied. This rule may, however, lead to difficulties where the nationalities of the parties are not the same. Moreover, the courts of most countries show a tendency in practice to apply the *lex fori* on grounds of public order. The rights prescribed by that law may be regarded as a minimum with the result that a foreign law which does not reach this standard will not be applied.

The confusion which exists is, perhaps, most evident in the case of illegitimate children. Here the following tests have been suggested, *viz.*, the law of the forum; the domicile of the father or the mother either at the time of conception or at birth; the domicile of the father at the date when proceedings were commenced; the national law of the father or of the mother, or of the child or of any two of them cumulatively.[34] In practice, however, the rules of private international law are apt to be elbowed out of place by the overriding effect of national ideas of *ordre public* or public policy, with the result that the making of affiliation orders appears, in all countries, to be a matter which is governed by the *lex fori*. But there is no need to enlarge on the differences which are revealed, even by a brief comparative survey of the situation,

[31] Tomforde, *op. cit.*, p. 177.
[32] Rabel, *op. cit.*, pp. 324–326; Wolff, *op. cit.*, pp. 359–361; Burge, *op. cit.*, pp. 590–592.
[33] Rabel, *op. cit.*, pp. 603–604; Wolff, *op. cit.*, pp. 398–399; Burge, *loc. cit.*
[34] Rabel, *op. cit.*, pp. 616–618; Wolff, *op. cit.*, pp. 411–413.

because it is obvious that the state of conflict which exists must have the effect of deterring would-be claimants from the institution of proceedings against a defaulter in the foreign country in which he has sought refuge.

The next question to be considered is whether the rules of private international law relating to the enforcement of foreign judgments are such as to provide a solution, either complete or partial, of the problem with which we are concerned. The answer to this question is very definitely in the negative. The position as it exists in private international law is highly unsatisfactory.[35] In certain countries the judgments of foreign courts are not enforced as such, although the fact that the dispute has been determined by a foreign court in his favour will be regarded as very cogent evidence to support a claim formulated in a second action in those countries.[36]

Other countries admit the right to enforcement but they may hedge this concession round with so many reservations and qualifications that it becomes worthless. The French courts, for instance, will not enforce a foreign judgment, except in cases covered by treaties, without a preliminary investigation of the merits. The case is re-opened with a view to ascertaining whether the foreign judgment infringes the French rules of *ordre public*. In effect the action is tried all over again and nothing is gained by basing it on the foreign judgment.[37] In Germany the law insists on reciprocity of treatment by the country from which the foreign judgment emanates, and foreign judgments relating to questions of family law (marriage, divorce, adoption, legitimacy and alimentary obligations) will not be enforced unless they accord with the basic principles of German law.[38] In England a foreign judgment will furnish a cause of action based on an undertaking to be implied by law from the fact of litigation, that the judgment will be satisfied by the unsuccessful party. The drawback to a seemingly liberal policy of enforcement is, however, that the English rule involves the setting in motion of the machinery of an ordinary civil action which may involve considerable expense and delay.[39] In the United States it is a rule of the Federal Court and of some of the State courts that enforcement will only be granted where

[35] See Gutteridge, ' Reciprocity in regard to Foreign Judgments ', Vol. 13, *British Year Book of International Law* (1932), p. 49.
[36] This is the position in the Netherlands, the Nordic countries and certain of the Swiss Cantons. See the brochure of the Rome Institute (*L'Exécution à l'Étranger des Obligations Alimentaires*) for a list of these cantons.
[37] Gutteridge, *op. cit.*, p. 59.
[38] Introductory Law to the German Civil Code (Einführungsgeretz), arts. 13 and 27.
[39] Gutteridge, *loc. cit.*

there is reciprocity of treatment, but the position is in other respects much the same as in England.[40]

These differences of rule and the consequent uncertainty and inconvenience have led to many attempts to provide a remedy in the shape of international conventions or treaties for reciprocity of enforcement.

Only a very few of these conventions are multilateral in character. In 1925 the Hague Conference on Private International Law prepared a draft convention for the reciprocal enforcement of judgments but this has remained a dead letter. In 1928 the Pan-American Congress of Havana prepared a similar draft which has been adopted by most of the South American countries though, in certain instances, subject to reservations. There are also multilateral conventions concluded for a different purpose which provide for the enforcement of judgments rendered in proceedings arising out of the execution of the main object of a convention, *e.g.*, the River Elbe Convention of 1922 and the Berne Railway Convention of 1924. Certain groups of neighbouring States have concluded conventions for reciprocal enforcement of judgments, *e.g.*, the Convention of Copenhagen, 1932, concluded between the five Nordic countries and the Convention of Kaunas, 1935, to which the former independent States of Latvia, Lithuania and Estonia were parties. But the great majority of the international conventions which deal with foreign judgments are bilateral, such as those concluded between Great Britain and France and Belgium respectively. More than twenty conventions of this type are in operation and some of them are of long standing, *e.g.*, the Franco-Swiss Convention of 1869.[41]

There are, however, other reasons besides the unsatisfactory state of the rules of conflict relating to the enforcement of foreign law judgments, which make it necessary to look elsewhere for relief. An international convention for the reciprocal enforcement of judgments in general may contain provisions which exclude its application to the judgments of subordinate courts [42] or to judgments rendered in matters of family law.[43] Further, in certain countries maintenance orders are not regarded as final judgments and are subject to revision and modification from time to time and

[40] Kuhn, *Comparative Commentaries on Private International Law*, pp. 30, 31, *Hilton* v. *Guyot* (1895), 159 U.S. 113, but cf. *Johnston* v. *Compagnie Générale Transatlantique* (1926), 242 N.Y. 603.

[41] See the brochure of the Rome Institute for texts of these Conventions.

[42] *E.g.*, Conventions concluded by virtue of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, see s. 1 (1) (*b*) of the Act.

[43] Franco-British Convention, 1934, art. 4 (3) (*a*); Belgo-British Convention, 1934, art. 3 (*b*).

this may operate to prevent their enforcement as foreign judgments.[44] In some countries the machinery of enforcement is cumbersome and likely to give rise to prohibitive delay and expense. But above all any value that the rules of private international law may have in relation to the enforcement of foreign judgments is, in practice, often nullified by the readiness of the courts in certain countries to evade enforcement by the application of their national rules of *ordre public* or public policy. In short, if it is desired to establish any universal scheme for reciprocal enforcement it will be necessary to look elsewhere than to the machinery which exists at present and to devise entirely new methods for this purpose.

The question is: Can this be done? The answer is that success or failure will depend on the removal of certain obstacles. In the first place it will be necessary to clear up ambiguities due to differences in the general structure and policy of the various national rules of law relating to the duty of maintenance and support. The ambiguity in the meaning of the phrase 'maintenance order' is a case in point. This may create problems which courts of summary jurisdiction are unfitted to solve, *e.g.*, whether the words include such payments as those which a court may impose on the father for the support of an unruly child who has been sent to a reformatory school. Further, it is improbable that Parliament would be willing to allow the enforcement under the guise of maintenance orders of decrees of foreign government officials or would sanction the issue of execution on the production of an *acte authentique exécutoire*. This would clearly be contrary to our English legal traditions. There are, in particular, obvious objections to the indiscriminate enforcement of foreign affiliation orders made in default of appearance. The differences which exist between the various types of such orders are very wide and the proof required before they can be made does not always reach the highest standards. The danger that an improper use might be made of facilities for the enforcement of foreign decrees of this nature is such that it cannot be ignored.

A further question which arises is whether it is expedient to allow a foreign maintenance order to be enforced when it is such that the court applied to for enforcement could not make it against one of its own nationals. This was the point which arose in *Peagram* v. *Peagram*.[45] In that case a provisional order had been made by the police court in Adelaide, South Australia, in default of appearance against a married man resident in England, directing him to pay a weekly sum of £5 10s. towards the support of his

[44] See Wolff, *op. cit.*, pp. 266–268; *Harrop* v. *Harrop*, [1920] 3 K.B. 386.
[45] [1926] 2 K.B. 165.

wife and child. The rate allowed in similar circumstances in England would only have been £2 a week and a circular had been issued to courts of summary jurisdiction by the Home Office advising the justices to limit the enforcement of the orders of foreign courts to the maximum allowed by English law. The Divisional Court of the King's Bench held that the mere fact that this maximum had been exceeded did not give the justices power to vary the foreign order. This case illustrates the need for the provision of adequate safeguards to prevent a respondent from being called on to pay a sum which is wholly beyond his means, particularly when, as in some countries, he may be committed to prison in default of payment.

During the course of the discussions which took place at the meetings of the Rome Committee at Brussels and Santa Margherita, it became obvious that the most serious impediments which stand in the way of any attempt to secure reciprocity in the enforcement of maintenance orders are those which concern the very difficult and delicate questions of jurisdiction and of the doctrines of public order or public policy. Unless these obstacles can be surmounted the prospects of arriving at international agreement are so faint as to be negligible. For this reason it would seem desirable to examine these two questions somewhat more closely than has been possible when dealing with the situation as a whole.

As regards jurisdiction the difficulties which are encountered arise from the fact that none of the usual criteria for the determination of the competence of a court to make an order which will be recognised and enforced by the courts of other countries are likely to be accepted in the present instance, apart from that of submission to the jurisdiction. There is no need to travel once again over familiar ground and to repeat the arguments for and against the adoption either of nationality or domicile as bases of jurisdiction because it is abundantly clear that neither of these criteria would meet with the universal approval which is required for any world-wide scheme of reciprocity. On the other hand, jurisdiction founded on residence would at first sight appear to offer more hope of a solution of the problem, but the objections to it are, in effect, almost as pronounced as in the case of nationality or domicile. It would, in the first place, seem to be necessary to choose between the residence of the claimant and the respondent. If the residence of the claimant is selected this might operate as a temptation to effect a change of residence for the purpose of obtaining the benefits of that particular *lex fori* which would be most favourable to the claimant. Moreover, a respondent who desired to set up his defence would be compelled to take steps in a foreign country and

this would in some instances lead to hardship, though the device of a provisional order made subject to confirmation by the court of the respondent's residence, as provided by the British Act of 1920, would seem to provide an answer to this objection. On the other hand, to confer sole jurisdiction on the courts of the respondent's residence would, in the great majority of cases, defeat the very object of any scheme of international reciprocity the chief aim of which must be to relieve claimants from the inconvenience, delay and expense of proceedings in a foreign country.

The Rome Committee arrived at a tentative solution of the problem of jurisdiction which illustrates the great difficulty in finding any solution to the problem along orthodox lines. Article 3 of the Committee's preliminary draft provides that a court shall be deemed to have jurisdiction to make a maintenance order if it is either a court of the country in which the respondent was habitually resident when proceedings were commenced against him or is a court of the country in which the parties had their last common habitual residence and in which the claimant was resident up to the time of the institution of proceedings. The same article also provides that a court is to be deemed to have jurisdiction if the case is one in which the private international law rules of the court applied to for enforcement would regard the foreign court as competent in the circumstances. These provisions, which were drafted after much discussion, appear to amount in substance to a reaffirmation of the principle *actor sequitur forum rei* and, in reality, still leave the question at large. A further ground for jurisdiction adopted by the Rome Committee was that of the submission of the respondent to the proceedings. This does not appear to call for comment as the principle is one which is universally accepted, but difficult questions may arise if courts of summary jurisdiction or other inferior courts are called upon to decide whether a certain line of conduct taken by a respondent or his advisors amounts to a submission on his part.

The disturbing influence of public policy or *ordre public* and certain other super-eminent principles, such as *boni mores* or morality, presents the most difficult and delicate of all the problems which must be solved if worldwide reciprocity is to be more than a mere pretence. The comparative aspect of these doctrines has yet to be worked out in detail but it is clear that *ordre public* and *public policy* are not the same thing and vary from country to country. These concepts have in one form or another been made to serve the purpose of a shield which may be interposed by a national court to prevent the enforcement of a foreign judgment which offends against the sense of justice of the court or embodies

conclusions which differ from those which would have been reached if the national law had been applied. This is more particularly the case if the foreign judgment has been given in default of appearance. Maitre Hennebicq, the Belgian member of the Rome Committee, put this point very neatly when he said that experience of the working of the reciprocity convention between France and Belgium showed that *ordre public* had come to be regarded as a safety valve (*soupape de sureté*) which could relieve a court from giving effect to a foreign judgment of which it disapproved. The disturbing influence of these doctrines can be shown by a few examples. According to French law all matters connected with the *obligation alimentaire* are questions of *ordre public*, with the result that if a foreign maintenance order does not accord with the standards laid down by French law the French courts must deal with it so as to give effect to the *lex fori* when they are called on for enforcement.[46] The German courts will refuse to give effect to any foreign maintenance order which places on a German national a liability greater than that imposed on him by his own law.[47] In a case of *Re Macartney*,[48] Astbury, J., refused to give effect to a judgment of a Maltese court awarding perpetual maintenance to an illegitimate child, one of the reasons for his decision being that it would be contrary to public policy to enforce the order. An American court refused to recognise a decision of a French court awarding maintenance to a son-in-law against the parents of his deceased wife. Public policy was not referred to specifically, but the inference to be drawn from the observations made by the court in giving judgment is that an obligation of the kind which formed the subject-matter of the action could not be enforced without doing violence to the public policy rules of the court.[49] The Committee of the Rome Institute was not able to come to any agreement on this question, although it was realised that unless some method can be found of controlling the application of doctrines such as those of public order and public policy any scheme for the reciprocal enforcement of maintenance orders would almost certainly break down in practice. To find a solution of this thorny problem will be far from easy. The Committee were sharply divided on the question and in the end a compromise was adopted by which two alternative solutions were inserted in their draft. The first of these consists in an enumeration of the cases in which the plea of public

[46] *Ex relatione*, M. Basdevant, Minutes of the Brussels Session of the Rome Committee. See also, Niboyet, *Traité de Droit International Privé*, Vol. 3, *sub. tit.* 'Filiation', p. 358.

[47] Rabel, *op. cit.*, p. 619.

[48] [1921] 1 Ch. 522.

[49] *De Brinmont* v. *Penniman* (1873), 10 Blatchford 436. See Burge, *op. cit.*, Vol. 2 at p. 592, and Kuhn, *op. cit.*, at p. 196.

policy or *ordre public* should be excluded; the second alternative states the cases in which the plea may be allowed.[50] Much time and ingenuity were devoted to the drafting of these alternative proposals but they do not appear to possess any significance, save in so far as they make it clear that there was a marked division of opinion among the members of the Committee. It is very unlikely that either of these alternatives would find favour if they were submitted to an international conference, and the moral to be drawn from them is that any attempt to arrive at compromise on the question of the effect to be given to the public policy rules of the court of enforcement would almost certainly result in failure. The British Act of 1920 and the Oslo Convention of 1931 are silent on this question, but a clause excluding the enforcement of judgments which infringe the public order rules of the court applied to enforcement is 'common form' in all the conventions for the reciprocal enforcement of judgments which came into being between the years 1919 and 1939. There appears to be no room for any intermediate solution, and the only solution would seem to be that a country must be left to apply its own rules of public order and must trust other countries to apply their corresponding rules with wisdom, impartiality and restraint.

The general conclusion to be drawn from the somewhat sombre picture which lies before us is that any universal scheme for reciprocity of enforcement, such as that outlined in the draft of the Rome Committee, is doomed to failure. There is at present an absence of that degree of mutual confidence which is essential if universal reciprocity is to be more than a pretence. In some countries the courts are efficient but cannot always be relied on if a foreigner seeks redress. In other countries the methods of proof do not always reach the standards to which we are accustomed, and there are also other reasons, of a procedural nature, which would make it undesirable to participate in any scheme of universal enforcement.

A solution which would, it is true, be incomplete, but might, nevertheless, do much to mitigate the hardships now being experienced, would be to develop the system embodied in the British Act of 1920 and the Oslo Convention of 1931 by which individual countries or groups of countries would enter into separate arrangements with one another specifying the conditions on which reciprocity would be granted. A serious stumbling block to progress in this direction is created by the reluctance of certain countries to allow the enforcement in their territory of foreign

[50] Preliminary Draft of a Convention on the Enforcement Abroad of Maintenance Orders, art. 6. *Unification of Law* (1938), Editions Unidroit, p. 213.

affiliation orders. This attitude can be well understood since the reciprocal enforcement of these orders, particularly when they have been made in default of appearance, is a matter which needs handling with care owing to the risk that the right of enforcement might conceivably be utilised for purposes of oppression or even of blackmail. The danger from this source would, however, be lessened appreciably if a grant of reciprocity were confined to countries with a similar outlook on matters of family law. It is also essential that the judicial system of those countries should be such as to command confidence and respect. A further safeguard would be to restrict the enforcement of foreign affiliation orders made in default of appearance to cases in which the respondent is either a national of the court making the original order or is domiciled within its jurisdiction. This is, in substance, the solution adopted in the Oslo Convention of 1931 and it appears to have much to recommend it. The difficulties as to jurisdiction which have been referred to would disappear if the system of the British Act of 1920 of provisional orders subject to confirmation by the court applied to for enforcement were adopted. Claimants would not be compelled to institute proceedings in a foreign country, which in most cases involves a denial of justice, and respondents would be protected against anything in the nature of a ' snap ' judgment against them.

Premature attempts to secure agreement on questions of such difficulty and delicacy as those which arise out of family law may easily lead to a deadlock followed by an aftermath of disappointment and a sense of frustration. But the existing situation is a reproach to a world in which international collaboration is not merely a matter of expediency, but has become an article of faith. Attempts to find a remedy on a worldwide scale are not likely to succeed but it does not follow from this that no efforts should be made to arrive at some less ambitious solution which might at least go some distance in providing a remedy for the hardships due to the present state of the law.

THE SETTLEMENT OF DISPUTES BY THE SECURITY COUNCIL

By Professor Hans Kelsen, of the University of California

Settlement of disputes or adjustment of other situations which might lead to a breach of the peace may be brought about by the Security Council or by the General Assembly; settlement of disputes may also be brought about by the International Court of Justice.

Chapter VI of the Charter, which bears the heading 'Pacific Settlement of Disputes', is particularly devoted to this subject; but it deals also with the adjustment of other situations, and does not contain all the provisions relating to the settlement of disputes and adjustment of other situations. Chapter XIV and the Statute of the International Court of Justice deal especially with the function of this agency, which is the 'principal judicial organ of the United Nations' and whose main function is to settle disputes. The jurisdiction of the General Assembly with respect to disputes and other situations is determined in Chapter IV. The provisions of Chapter VI refer mainly to the jurisdiction of the Security Council, but some refer also to the General Assembly and the International Court of Justice. Important provisions are to be found also in Chapters V, VII, VIII and XV.

There are various procedures for the settlement of disputes and the adjustment of other situations by the Security Council. Two of these procedures are instituted by the parties to the dispute, the others by the Security Council. The latter are instituted on the initiative of the Council itself, or on the initiative of a member, of a non-member, of the General Assembly or of the Secretary-General.[1]

[1] According to the usual interpretation, the Charter establishes only one procedure for the settlement of disputes, and this procedure has four stages. During the first three stages it is a procedure of pacific settlement. In the first stage, the Security Council does not appear (Art. 33, para. 1); in the second stage, the Security Council may recommend procedures, and in the third stage it may recommend terms of settlement (Art. 33, paras. 2 to 38). The fourth stage is under Art. 39. At this stage, the procedure ceases to be one of pacific settlement. This interpretation is not compatible with the text of the Charter. To assume four stages would be possible only if the Charter fixed a chronological order so that the second stage had to be preceded by the first, the third by the second, and the fourth by the third stage. This, however, is not at all the case. At one and the same stage the Security Council may recommend procedures or terms of settlement (Art. 37, para. 2); it may recommend procedures 'at any stage' according to Art. 36, para. 1; and the Council may

(a) PROCEDURES INSTITUTED BY THE PARTIES

The first of the two procedures to be instituted by the parties to the dispute is regulated by Article 33, paragraph 1, and Article 37. These Articles refer only to disputes, not to other situations. Article 33, paragraph 1 runs as follows:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The intention of this provision is to impose an obligation upon the parties to a dispute: the obligation 'first of all' to seek a solution of the dispute by peaceful means of their own choice. It may be doubted whether non-compliance with this provision can be considered to be the condition of a sanction, since the formula 'to seek a solution' is too vague, and the parties to the dispute are not bound, in case one of the means indicated in this paragraph fails, to try another and finally to apply the one which alone guarantees a settlement, namely, arbitration or judicial decision. Nothing in the wording of Article 33, paragraph 1, allows the interpretation that the parties are obliged to exhaust all possible means of pacific settlement. The parties shall seek a solution by one or the other means indicated. If one party suggests one of these means, the other is not obliged to accept it. There must be an agreement between the parties with respect to the means of settlement, and there can be no legal obligation to come to an agreement. If one party enters into negotiation without any serious intention to come to an agreement or suggests one of the other means indicated in this paragraph, knowing that the other party will reject it, it may maintain that it has complied with the prescription 'to seek a solution'. The importance of the provision concerned does not lie in the possibility of a sanction in case of non-compliance, but in the non-application of Article 37. If the means by which a solution of the dispute shall be sought under Article 33, paragraph 1, are not properly tried by one party, the other may object to refer the dispute to the Security Council under Article 37, paragraph 1, on the ground that the requirement of Article 33, paragraph 1, to seek 'first of all' a solution by the means indicated in this paragraph is not yet fulfilled, and that the fulfilment of this requirement is a

apply Art. 39 even before the first stage is terminated. Hence the view that there is only one procedure of settlement divided into three or four stages, is untenable.

condition of the application of Article 37. The Security Council may, for the same reasons, refuse to act under Article 37, paragraph 2, in case a party refers the dispute to the Council under Article 37, paragraph 1. It is one of the main principles underlying the system of norms adopted by the Charter for the settlement of disputes that the Security Council should intervene in a dispute only after the parties themselves have tried to settle it by means of their own choice. It is especially in this respect that the Charter differs from the Covenant of the League of Nations, which did not contain a provision similar to that of Article 33, paragraph 1.

Under this Article, the parties are not obliged to seek first of all the adjustment of a situation, which has not the character of a dispute, by means of their own choice; they are obliged only to seek first of all a solution of their dispute; not of all disputes but only of disputes 'the continuance of which is likely to endanger the maintenance of international peace and security'. Who has to decide the question as to whether a situation in which more than one State is involved, is a 'dispute', and, if so, whether the dispute is of the nature referred to in Article 33, paragraph 1? As long as the Security Council does not intervene, these questions can be decided only by the parties themselves, that is to say, by agreement. But if there is no agreement with respect to these questions, if one party does, but the other does not, consider the situation to be a dispute,[2] or the dispute to be dangerous to the peace, Article 33, paragraph 1 is not applicable. This, again, is of importance with respect to the application of Article 37 which we shall discuss later.

The enumeration of the peaceful means for the solution of the dispute: 'negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements', is exhaustive. There are no other means of peaceful settlement. Hence, either the preceding enumeration or the formula 'or other means of their own choice' is superfluous. This formula is, in addition, misleading. For the question may arise whether the parties may choose under Article 33, paragraph 1, as a peaceful means, submission of the dispute to the Security Council or the General Assembly, as a kind of 'conciliation'. The question as to whether the parties are authorised by Article 33, paragraph 1, to submit this dispute to the Security Council should be answered in the negative since reference to the Security Council is permitted only after other means of peaceful settlement have been tried without

[2] The conflict between Syria and Lebanon on the one hand, France and Great Britain on the other, was brought before the Security Council by Lebanon as a 'dispute'; but the French Government denied that the case was a 'dispute.' (*Journal of the Security Council*, 1st year, No. 8, p. 39; No. 16, pp. 303, 343.)

success. Hence, by 'conciliation', not conciliation through the Security Council, can be meant. Besides, the Security Council in settling disputes does not represent the pure type of a conciliation commission. Hence the interpretation according to which the parties are not authorised to refer their dispute to the Security Council under Article 33, paragraph 1, is not seriously endangered by the enumeration of peaceful means of settlement in this paragraph. But the addition of the formula 'or other means of their own choice' might have this effect. However, reference to the Security Council remains, not according to the wording, but according to the spirit of Article 33 in connection with Article 37, excluded. Somewhat different is the question as to whether submitting the dispute to settlement by the General Assembly is among the means of the parties' 'own choice' referred to in Article 33, paragraph 1. The General Assembly is competent to settle disputes by making recommendations under Articles 10 and 11, and members as well as non-members are entitled to bring disputes before the General Assembly under Article 35. The wording of the Articles concerned does not exclude submitting the dispute to the General Assembly under Article 33, paragraph 1. But it may be doubted whether this was intended by the legislator.

After the parties to the dispute have complied with the provisions of Article 33, paragraph 1, and have failed to settle their dispute by the means indicated in the paragraph, Article 37 applies. This Article is in close connection with Article 33, paragraph 1. The two provisions belong together: they form integral parts of one and the same procedure. The fact that three other Articles, establishing procedures different from that regulated by Article 33, paragraph 1, and Article 37 are inserted between these Articles is very confusing.

Article 37 runs as follows:

> 1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
>
> 2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

The wording of paragraph 1 does not allow of any doubt that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, after having failed to settle the dispute in accordance with Article 33,

paragraph 1, have no choice among the various procedures provided for the settlement of disputes in the other Articles of Chapter VI of the Charter. The only way they have to follow is the one determined by Article 37 : they must refer the dispute to the Security Council under paragraph 1 of that Article.

Whether the competence of the Security Council under Article 37 is established in case one party refers the dispute to the Council, or whether there must be an agreement of the parties to refer the dispute to the Council is not very clear. The wording of Article 37, paragraph 1: 'they shall refer it to the Security Council', allows both interpretations. But at the seventh meeting of Committee III/2 of the San Francisco Conference (Doc. 433, III/1/15, p. 1), 'The interpretation was given that if one party to a dispute should violate its obligation to refer the dispute to the Security Council, such failure would in no case affect the right of the other party so to refer it, and the Security Council would then be wholly seised of the dispute'. Under Article 15, paragraph 1, of the Covenant, no agreement was necessary to constitute the competence of the Council to settle a dispute. But the Council had no power under Article 15 to intervene in a dispute on its own initiative. Since the Security Council has this power under Article 34 of the Charter, it would be understandable if the Charter were to require agreement of the parties to establish the competence of the Security Council in a procedure instituted by the parties. As pointed out, such agreement seems to be necessary in so far as the parties are obliged to refer the case to the Security Council only if it is a 'dispute', the continuance of which is likely to endanger the maintenance of international peace and security, and if their attempt to settle it by peaceful means of their own choice has failed. If only one party is of the opinion that the case is a dispute, and that its continuance is likely to endanger peace, whereas the other party is not, and hence refuses to refer the case to the Security Council under Article 37, paragraph 2, it is doubtful whether this paragraph applies. But Article 37, paragraph 2, provides that the Security Council, after a dispute has been referred to it, shall first decide whether the continuance of it is in fact likely to endanger the maintenance of international peace and security. This implies the decision whether the matter referred by one party to the Security Council is a dispute, in case the other party denies it. The decision of the Security Council that the continuance of the dispute is 'in fact' likely to endanger the maintenance of international peace and security, is adequate only in case there is no agreement of the parties with respect to the question as to whether the condition of Article 33, paragraph 1, that the continuance of the dispute is

likely to endanger the peace, is fulfilled. If both parties agree that the dispute is a danger to the peace, it seems to be very strange to allow the Security Council to decide that the dispute is no danger to the peace, and that, therefore, there is no reason to interfere. This competence of the Security Council is justifiable solely when one party only refers the dispute to the Council, because the other party is not of the opinion that the continuance of the dispute is likely to endanger the peace. Then, and only then, is it understandable that the Security Council has to examine whether this is 'in fact' the case.

There may be disagreement between the parties with respect to the application of Article 37, paragraph 1, not only on the ground that one, but not the other, party considers the matter to be a dispute, or the dispute to be dangerous to the peace, but also on the ground that only one party, but not the other, is of the opinion that they have failed to settle their dispute by the means indicated in Article 33, paragraph 1. One party might, in opposition to the other, think that there is not yet a reason to assume that the means applied by them to settle their dispute will not succeed, or that other means, not yet tried, might succeed. May the Security Council decide this question as it may decide the question disputed by the parties, whether the matter is a dispute or whether the continuance of the dispute is likely to endanger the peace? Article 37, paragraph 2, expressly authorises the Security Council only to decide the last two questions. But it is not excluded to argue that the fulfilment of the provision of Article 33, paragraph 1, first of all to seek a solution of the dispute by means of the parties' own choice, is a condition of the application of Article 37, paragraph 2, establishing the jurisdiction of the Security Council, and that, consequently, the Security Council has to decide whether this condition is fulfilled. If the Security Council deems that the parties have not yet fulfilled the requirement of Article 33, paragraph 1, it may refuse to intervene under Article 37, paragraph 2. The Security Council may also indirectly decide the disputed question as to whether the requirement of Article 33, paragraph 1, is fulfilled. It may, in applying Article 37, paragraph 2, decide that the continuance of the dispute endangers the peace and recommend to the parties to continue the procedure they have adopted for the settlement of the dispute, or adopt another procedure indicated in Article 33, paragraph 1. If, however, the parties agree that it is of no use to continue to act under Article 33, paragagph 1, the Security Council must not refuse to intervene under Article 37, paragraph 2, that is to say, the Council has to examine the question as to the nature of the dispute, and, if it deems it dangerous, to make one of

the two recommendations referred to in this paragraph. For at the stage of the dispute to which Article 37, paragraph 1, refers, that is, before an investigation of the dispute by the Security Council, the question as to whether the parties have complied with the provision of Article 33, paragraph 1, can be decided in no other way than by agreement of the parties.

After the dispute has been referred to the Security Council under Article 37, paragraph 1, the question arises whether the Security Council is bound to deal with the matter, or whether it is within its discretion to place or not to place the matter on its agenda. The wording of Article 37, paragraph 1, is not clear. It is not expressly stipulated that the Security Council in case a dispute is referred to it under Article 37, paragraph 1, 'shall' decide whether the continuance of the dispute is in fact likely to endanger the peace; it is only said: 'If the Security Council deems . . .'. But the fact that this provision is stipulated in the same Article as the provision that the parties to the dispute 'shall' refer it to the Security Council in case their attempts to settle it by means of their own choice under Article 33, paragraph 1, have failed, allows the assumption that the intended meaning of Article 37, paragraph 2, is: that the Security Council in case a dispute has been referred to it under Article 37, paragraph 1, is bound to apply Article 37, paragraph 2, and that only if a dispute has been referred to the Council under Article 37, paragraph 1, the procedure of Article 37, paragraph 2, has to take place. If this interpretation is accepted, the procedure of the Security Council regulated in Article 37, paragraph 2, is not a procedure ex officio; it is a procedure which depends on the parties to the dispute.

The first step in this procedure is the examination by the Security Council of the question whether the matter is a 'dispute', and whether the continuance of the dispute is likely to endanger the maintenance of international peace and security. The opinion of the parties involved about the nature of the case: whether it is a dispute or not, and whether its continuance endangers the peace, is not binding upon the Council. In establishing its jurisdiction over the case, the Council has to decide for itself whether the requirements of the Charter are fulfilled. This implies an investigation which the Council is authorised to make by Article 34. The provision of Article 37, paragraph 2: that the Council before taking action under Article 36 or recommending terms of settlement must decide whether the continuance of the dispute endangers the peace, presupposes that the Council has not yet investigated the dispute under Article 34, and hence, not yet determined, whether it is of the nature referred to in this provision, at the moment the parties refer

it to the Council. The result of the Council's examination may be negative or positive. In the first case, the Security Council is not allowed to intervene; in the second case, 'it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate'. That means that the Security Council has the choice between the two different measures indicated here. 'To take action under Article 36' means 'to recommend appropriate procedures or methods of adjustment'. The words 'to take action' as used in contradistinction to 'recommend such terms, etc.', are not well chosen. The term 'action' is used in the Charter to designate enforcement action. But the 'action' referred to in Article 37, paragraph 2, is only a 'recommendation'; a mere recommendation of procedures for the settlement of the dispute, not a recommendation of terms of settlement. The Charter emphasises the distinction between these two kinds of recommendations, of which only the second one goes into the merits of the case. It is very doubtful whether at this stage of the dispute, after the parties have tried in vain to settle their dispute by the means indicated in Article 33, paragraph 1, and, for this reason, have both referred the dispute to the Security Council, it is appropriate for the latter to recommend to the parties to try again one of these means. As pointed out, only in case the parties do not agree with respect to the question as to whether attempts to settle their dispute under Article 33, paragraph 1, should be continued, a recommendation of procedures or methods is justified. However, such recommendation is hardly compatible with the Security Council's decision that the continuance of the dispute is likely to endanger the maintenance of international peace and security. If the situation implies a danger to the peace, only recommendations of terms of settlement seem to be appropriate. The provision of Article 37, paragraph 2, may probably be explained by the general tendency to confer upon the Security Council the greatest possible amount of discretion, to avoid any strict determination of its functions.

The second procedure instituted by the parties is regulated by Article 38, which runs as follows:

> Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

The wording of this Article allows two contradictory interpretations. Since it refers to 'any' dispute, it may be interpreted to mean that, if the parties to a dispute—whether or not of the

nature referred to in Article 33, paragraph 1—agree, the dispute may be brought before the Council for settlement, without any previous attempt by the parties themselves to settle it according to Article 33, paragraph 1. The formula 'Without prejudice to the provisions of Articles 33 to 37', may be interpreted to mean that these Articles apply if there is no agreement of the parties to refer the dispute immediately for settlement to the Council. However this formula may be interpreted to mean—and this interpretation is more plausible—that Article 38 refers only to disputes which are not of the nature referred to in Article 33. If the parties agree that their dispute is not likely to endanger the peace, they may by agreement submit the dispute directly to the Security Council. The competence of the Security Council cannot be established—as it can under Article 37, paragraph 1—by one party referring the dispute to the Council. Whereas, under Article 37, paragraph 2, the Security Council 'shall' make a recommendation, under Article 38 it 'may' do so. It may make recommendations to the parties with a view to a pacific settlement of the dispute; but it may also refuse to make such recommendations. Under Article 37, paragraph 2, after having determined the dangerous character of the dispute, the Council has the choice between two different measures: either recommendation of 'appropriate procedures or methods of adjustment' or of 'such terms of settlement as it may consider appropriate'; but it 'shall' make the one or the other, provided that the dispute has been referred to it under Article 37, paragraph 1; just as the Security Council can 'make recommendations to the parties with a view to a pacific settlement of the dispute' only if all the parties to the dispute so request under Article 38. The procedure under Article 38, just as the procedure under Article 37, paragraph 2, is not a procedure ex officio, it depends on the parties.

Article 37, paragraph 2, and Article 38, are the only provisions of Chapter VI of the Charter by which the Security Council is authorised to recommend terms of settlement. They refer to disputes only, not to other situations, and only to disputes brought before the Council by the parties themselves; not to disputes in a procedure instituted by the Council ex officio. This is evident in so far as Article 38 is concerned. That the provision of Article 37, paragraph 2, authorising the Council to recommend appropriate procedures, etc., or terms of settlement, refers only to disputes which the parties, under Article 37, paragraph 1, after having failed to settle them by means of their own choice, are obliged to bring before the Council, results from the fact that the provision of paragraph 2 is combined with the obligation of paragraph 1 in one and the same Article. 'The dispute' of which paragraph 2 speaks can

refer only to the dispute mentioned in paragraph 1. It is possible that this was not intended by those who drafted the Charter. But if the provision of paragraph 2, authorising the Security Council to recommend procedures or terms of settlement, was intended to refer to all disputes with which the Council may deal, it was a mistake to place it together with the one concerning the obligation of the parties to refer unsettled disputes to the Council, in the same Article.[3]

The terms of settlement recommended by the Security Council under Article 37, paragraph 2, or Article 38, need not necessarily be in conformity with international law. Article 37, paragraph 2, authorises the Security Council to recommend such terms of settlement ' as it may consider appropriate '. Article 38 does not contain even this restriction with respect to the content of the recommendation. It is true that Article 24, paragraph 2, expressly provides that the Security Council, in discharging its duties, ' shall act in accordance with the Purposes and Principles of the United Nations '. But Article 1, paragraph 1, stipulates as a purpose of the United Nations ' to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations '. That means that the Security Council is authorised to recommend a settlement which might involve an infringement upon the rights which the one or the other party has under existing international law, if the Security Council considers such settlement as ' just ' or, under Article 37, paragraph 2, as ' appropriate '. There is hardly any difference between the two terms, since it is upon the Security Council to decide what is ' just ' or ' appropriate ', and it may always consider a recommendation which it thinks ' appropriate ' as ' just '. In case of a territorial dispute, for instance, the Security Council might recommend as appropriate that one party shall cede a part of the disputed territory to the other party, regardless of whether the latter has any legally justifiable claim to this territory.

In the procedures instituted by the parties, *viz.*, the procedure under Article 37, in connection with Article 33, paragraph 1, and the procedure under Article 38, the competence of the Security Council, as pointed out, is established by the parties referring the dispute to the Council. Consequently, the Council ceases to be competent in the matter as soon as the parties agree to withdraw

[3] The Dumbarton Oaks Proposals conferred upon the Security Council no power to recommend terms of settlement. If this was due to the idea that to recommend terms of settlement was incompatible with the sovereignty of the States, it was not consistent to confer—in the Dumbarton Oaks Proposals as well as in the Charter—upon the General Assembly the power to make recommendations without any restriction as to their contents. Cf. *infra*, p. 204.

the dispute from the Council. In this case the matter is automatically removed from the agenda of the Security Council. However, such withdrawal is of great importance, since the Security Council may restore its jurisdiction by instituting a procedure on its own initiative under Articles 34 and 36.

That the parties have the power to terminate the jurisdiction of the Council by withdrawing the case from the Council, seems to be self-evident in the procedure under Article 38. In the procedures regulated by Article 33, paragraph 1, and Article 37, the parties may withdraw their dispute from the Security Council, either because they have succeeded in settling the dispute by means of their own choice after it has been referred to the Security Council, or because they agree to continue their efforts to settle the dispute under Article 33, paragraph 1; at least, if they withdraw the dispute before the Council has determined, under Article 37, paragraph 2, its dangerous character. But even after the Security Council has determined the dangerous character of the dispute, withdrawal of the dispute from the jurisdiction of the Council may be considered to be possible, as long as the Security Council has not made a recommendation under Article 37, paragraph 2. This follows from the fact that the competence of the Security Council under Article 37 depends on the parties, and the parties are obliged to refer the dispute to the Council only if they believe, or at least if one party believes, that there is no hope to settle it by peaceful means of their own choice. In this procedure no other authority can decide these two questions before the dispute is referred to the Council. After it is referred to the Council, the latter, it is true, becomes competent to decide that the dispute is dangerous to the peace. But this decision loses all importance if the parties afterwards reach an agreement, either with respect to the settlement or with respect to the continuance of their attempts to settle it. As pointed out, one of the basic ideas of Chapter VI is to encourage pacific settlement of disputes by the parties themselves, to induce them to exhaust all possible means of their own choice, and to allow interference of the Security Council only after it is clear that the first way does not lead to a settlement. If it is assumed that the procedure of Article 37, paragraph 2, has to take place only if a dispute is referred by the parties to the Security Council under Article 37, paragraph 1, this procedure cannot be continued if the parties have withdrawn the dispute from the Council.

(B) PROCEDURES INSTITUTED BY THE SECURITY COUNCIL

The principle that the Security Council shall interfere in a dispute only after the parties have tried in vain to settle it by means of their

own choice, is not consistently maintained by the Charter. There are other procedures for the settlement of disputes which are determined by the opposite principle. First of all, the procedure to be instituted by the Security Council itself on its own initiative. It is regulated by Article 34, Article 33, paragraph 2, and Article 36.

Article 34 runs as follows:

> The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

The provision of this Article is ambiguous. It may mean that the Security Council is authorised to make investigations if the Council —in the course of the procedures regulated in the other Articles of Chapter VI, for instance, in applying Article 37, paragraph 2— deems necessary such investigation. This term should be construed in a specifically technical sense. But Article 34 may also be interpreted to mean the Council is authorised to institute a procedure with respect to any dispute or any situation of the nature determined in that Article, on its own initiative, by undertaking an investigation. This interpretation of the provision regarding investigation may be supported by the fact that it precedes—as Article 34—all the Articles regulating the procedures of the Security Council for the settlement of disputes and adjustment of other situations. If Article 34 were not intended to establish a special procedure, but only to refer to a phase within other procedures, it would have been placed after the Articles regulating these procedures. If the interpretation is accepted that Article 34 regulates a special procedure of the Security Council, the latter is authorised to intervene ex officio in any dispute—and any other situation of the nature determined in this Article—even before the parties had any opportunity of settling the dispute by peaceful means of their own choice or of adjusting, by themselves, the situation. This intervention must be carried out as an ' investigation '. If Article 34 is construed as establishing an ex officio procedure of the Security Council, the term ' investigation ' must be interpreted in a broader rather than a mere technical sense. It must include all preliminary steps leading to a technical investigation, especially the decision of the Council to deal with a dispute or another situation ex officio, that is, to place the matter on its agenda, without which no investigation of the dispute or situation can be decided upon. That Article 34 is interpreted as establishing an ex officio procedure of the Security Council does not exclude the possibility of applying

Article 34 to investigations necessary in the course of procedures regulated in other Articles of the Charter. The Council may 'investigate' a dispute or another situation by examining and discussing written or oral statements by the parties to the dispute or those involved in the situation. The Council may undertake investigation through a special organ appointed for this purpose by the Council. The decision by which this organ is to be created is taken under Article 34, and can hardly be taken without previous discussion of the dispute or situation to be investigated. This discussion, too, takes place under Article 34. The special organ may be a commission authorised to carry out the investigation on the territory of the State party to the dispute or involved in the situation to be investigated. The members must permit such investigation since they are obliged by Article 25 to 'carry out the decisions of the Security Council in accordance with the present Charter'.

Under Article 34, the Security Council has the power to investigate 'any dispute', but 'situations' only 'if they might lead to international friction or give rise to a dispute'. It is quite reasonable that the Security Council is authorised to investigate any dispute 'in order to determine whether the continuance of the dispute . . . is likely to endanger the maintenance of international peace and security'. But it amounts to a vicious circle to provide that the Council may investigate only a situation 'which might lead to international friction or give rise to a dispute' in order to find out whether this situation is a danger to the peace. To determine that the situation might lead to international friction or give rise to a dispute is possible only after an investigation of the situation, by whatever means this investigation may be carried out.[4]

It is important to note that the investigation referred to in Article 34 is limited as to its purpose: it must be undertaken in order to determine whether the continuance of the dispute or

[4] At the 16th meeting of the Security Council, during the discussion of the Indonesian case, the representative of the United States declared: '. . . because the right to investigate is important the United States Government feels that investigations should not be lightly undertaken. In determining whether or not a situation warrants investigation, the Security Council must have reason to believe from all the circumstances before it that the continuance of the situation is likely to endanger international peace'. (*Journal of the Security Council*, 1st year, No. 13, p. 233.) This statement is not quite in conformity with Art. 34. It is just the purpose of the investigation to determine whether the continuance of the situation is 'likely to endanger international peace'. But it would be possible to say that the Security Council in determining whether or not a situation warrants investigation must have reason to believe that the situation 'might lead to international friction or give rise to a dispute'. The representative of the United States probably did not see any essential difference between this formula and the one he used. If he was right, the text of Art. 34 contains the vicious circle mentioned above.

situation under consideration by the Council ' is likely to endanger the maintenance of international peace and security '. It is an investigation within the framework of the procedures laid down in Chapter VI. The decision of the Council to undertake such an investigation concerns—according to the interpretation of Article 27 by the four sponsoring Powers—a substantial, not a procedural matter, and hence, requires a majority of seven members including the concurring votes of the permanent members. However, investigations may be necessary for other purposes than those determined in Article 34: for instance, in order to determine, under Article 39, the existence of facts which constitute a ' threat to the peace, breach of the peace, or act of aggression ', which is quite different from a dispute or situation ' likely to endanger . . . peace . . . '[5]; and not only by the Security Council but also by the General Assembly, the latter being competent, too, to deal with disputes and other situations dangerous to the peace. Nevertheless, Article 34 is the only provision of the Charter expressly providing for investigation. Hence, the interpretation is possible that investigations are authorised by the Charter only for the purposes determined in Article 34, and that only the Security Council is authorised to undertake investigations. Although it is likely that this was indeed the original intention of those who drafted the Charter, such interpretation would lead to absurd consequences. Hence, it is understandable to look for other Articles of the Charter to get a legal basis for investigations not covered by Article 34. Articles 29 and 22 may be used for this purpose. These Articles confer upon the Security Council and the General Assembly the power to ' establish such subsidiary organs as they deem necessary for the performance of their functions '. If the performance of a function conferred upon the Security Council or the General Assembly makes it necessary, both agencies may establish committees and authorise them to make investigations. The difference between such a committee of investigation established by the General Assembly and the one established by the Security Council is that, in the first case, the members are not obliged to permit the investigation, since Article 25 refers only to decisions of the Security Council, not to decisions of the General Assembly. On the other hand, the establishment by the Security Council of a committee under Article 29 concerns, according to the interpretation of Article 27 by the sponsoring Powers, a procedural, not a substantial matter and, consequently, the decision concerned in question is not subject to the veto right

[5] Cf. the statement which the President of the Security Council made in the discussion of the Spanish case at the 44th meeting of the Security Council (*Journ. of the Security Council*, 1st year, No. 37, pp. 731 f.).

of the permanent members of the Security Council.[6] Further, the decision by which a committee under Article 29 is established, is not a ' decision under Chapter VI '; hence, the provision of Article 27, paragraph 3, that ' a party to a dispute shall abstain from voting ', does not apply. It is evident that such an interpretation of Articles 22 and 29 makes Article 34 superfluous, at least in so far as this Article refers to investigations in the course of procedures regulated by other Articles, especially in case Article 29 is applied when the Security Council or the General Assembly are performing functions conferred upon them by Chapter VI. In any case, this interpretation of Articles 22 and 29 has the effect of evading the provision of Article 34. Against such an application of Article 29, it may be argued that if the Security Council decides to undertake an investigation, it can do so only under Article 34, and if the Council wishes to make the investigation through a special committee, it can establish this committee only under Article 29. The decision to investigate must be distinguished from the establishment of an investigation committee. The former is a substantial ' decision under Chapter VI ', the latter a procedural decision under Chapter V, section ' Procedure '. But the wording of Articles 22 and 29 does not exclude the possibility of the other interpretation, which is certainly inconsistent with Article 34, but which, however, avoids absurd consequences of this Article when interpreted as the only provision of the Charter authorising investigations.[7]

[6] Cf. the discussion of the Greek case (Ukrainian complaint) at the 70th meeting of the Security Council. (*Official Records*, 1st year, 2nd Series, No. 16, pp. 410 f.)

[7] In the Spanish case the Security Council, at the suggestion of the Australian delegate, appointed a ' subcommittee ' under Art. 29, instead of an investigation commission under Art. 34, and instructed this subcommittee ' to examine the statements made before the Security Council concerning Spain, to receive further statements and documents and to conduct such inquiries as it may deem necessary, and to report to the Security Council before the end of May '. The function of this subcommittee evidently was to investigate, though it has not been called by this term. The purpose of the subcommittee's investigation was—according to the resolution by which it was established—to enable the Security Council to decide whether the situation in Spain ' has led to international friction and endangers international peace and security '. (*Journ. of the Security Council*, 1st year, No. 31, p. 602; No. 32, p. 628.)

In the Corfu Channel Incident case, the Australian delegate suggested again to appoint a ' subcommittee ' ' to examine all the available evidence concerning the above-mentioned incidents, and to make a report to the Security Council '. (Security Council, *Official Records*, 2nd year, No. 8, p. 364.) The delegate of Colombia in discussing this suggestion, declared that the investigation to be made by the subcommittee ' is not the technical investigation mentioned in Art. 34 of the Charter '. ' Article 34 uses the word " investigation " in a much more restricted and technical sense '. (*Official Records*, 2nd year, No. 21, p. 429.) The distinction between ' technical ' and non-technical investigation has no basis in the text of Art. 34.

In the Greek case, the Security Council at its 87th meeting established under Art. 34 a commission of investigation, and by a resolution adopted at its 131st meeting, the Council authorised this commission to establish ' a subsidiary group composed of a representative of each of the members of the commission to continue to fulfil such functions as the commission may prescribe in accordance

If an investigation undertaken by the Security Council under Article 34 has the result that the Council determines the dangerous character of the dispute or of the situation, the Council may apply Article 33, paragraph 2, or Article 36.

Article 33, paragraph 2, stipulates:

> The Security Council shall when it deems necessary, call upon the parties to settle their dispute by such means.

The wording 'The Security Council shall . . . ', in contradistinction to 'The Security Council may . . . ', is used when the legislator intends to make a certain function of the Council mandatory. By adding the words 'when it deems necessary', Article 33, paragraph 2, obliterates this effect, and, at the same time, comes in conflict with the principle that the Security Council shall intervene only after the parties have tried to settle the dispute by means of their own choice.

The means referred to in this paragraph are the peaceful means of the own choice of the parties indicated in Article 33, paragraph 1. Article 33, paragraph 2, is applicable only to disputes, not—as Article 36—to other situations also. It seems as if the word 'call' used in Article 33, paragraph 2, is supposed to be possible without the investigation referred to in Article 34. The 'call' shall be made if the Security Council deems it necessary. This provision precedes Article 34, providing for investigation. If, however, Article 33, paragraph 2, authorises the Security Council only to call upon the parties to settle disputes referred to in paragraph 1 of this Article, that is to say, to disputes the continuance of which is likely to endanger the peace, the Council can exercise this function only if it has determined the dangerous character of

with its terms of reference'. (*Official Records*, 2nd year, No. 37, pp. 796, 800.) In pursuance of this resolution, the commission established the subsidiary group. At the 133rd meeting of the Security Council the delegates of the Soviet Union and of Yugoslavia maintained that the commission was not entitled to delegate its own functions to the subsidiary group. (Security Council, *Official Records*, 2nd year, No. 39, p. 829, and Doc. S/P.V. 134.) The arguments of the delegates of the Soviet Union and Yugoslavia are not correct. It is true that delegation of power conferred on an organ by a constitution is legal only if the constitution permits such delegation. But the Charter authorises the Security Council and the General Assembly in Arts. 22 and 29 to delegate, to a certain extent, their powers on subsidiary organs, since these organs are to be established 'for the performance of the General Assembly's and the Security Council's functions'. To interpret Art. 34 as authorising the Security Council to establish a commission of investigation implies the interpretation according to which the Security Council is authorised to delegate its power of investigation to such commission. It is true that the commission established by the Council is not entitled to establish on its own initiative a subsidiary organ and to confer upon it functions conferred upon the commission by the Council. But this was not the case with the establishment of the subsidiary group by the commission of investigation set up by the Security Council in the Greek case. The subsidiary group was appointed on the basis of a resolution of the Security Council adopted within the limits of Art. 34.

the dispute, which seems to be possible only after the investigation referred to in Article 34. Investigation under Article 34 is the means prescribed by the Charter by which the Security Council has to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 36 stipulates:

> 1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33, or of a situation of like nature, recommend appropriate procedures or methods of adjustment.
>
> 2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.
>
> 3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

The formula 'appropriate procedures or methods of adjustment' refers both to disputes and other situations. As to disputes, recommending 'procedures or methods of adjustment' is a measure different from recommending 'terms of settlement' of a dispute stipulated in Article 37, paragraph 2. That the recommendation referred to in Article 36, paragraph 1, is not a recommendation of 'terms of settlement' results from the fact that, according to Article 37, paragraph 2, the Security Council has to make a choice between these two kinds of recommendations. As to other situations, recommending 'procedures or methods of adjustment' must be different from recommending 'terms of adjustment'. Recommendations made under Article 36, paragraph 1, must not have a substantial, but only a procedural character. Under Article 36, paragraph 1, the Security Council may recommend a specific way which, according to its opinion, might lead to the settlement of a dispute or the adjustment of another situation; but the Council must not recommend a definite settlement or adjustment.[8] Hence,

[8] The subcommittee established by the Security Council at its 39th meeting in the Spanish case suggested that the Council should take, under Art. 36, para. 1, the following actions: '(a) The endorsement by the Security Council of the principles contained in the declaration by the Governments of the United Kingdom, the United States and France, dated March 4, 1946. (b) The transmission by the Security Council to the General Assembly of the evidence and reports of this subcommittee together with the recommendation that unless the Franco regime is withdrawn and other conditions of political freedom set out in the declaration are, in the opinion of the General Assembly, fully satisfied, a resolution be passed by the General Assembly recommending that diplomatic relations with

as far as disputes are concerned, to recommend ' appropriate procedures or methods of adjustment ', as provided by Article 36, paragraph 1, seems to be the same as to call upon the parties to settle their dispute by the peaceful means of their own choice, as provided by Article 33. These ' means ' comprise all possible ' procedures or methods of adjustment ', or of ' solution ' as Article 33, paragraph 1, says. Since ' procedures ' are ' methods ', and vice versa, one of the two terms is superfluous. Apart from the fact that the provision of Article 33, paragraph 2, refers only to disputes; whereas the provision of Article 36, paragraph 1, refers to other situations also, the two provisions are different only in so far as Article 33, paragraph 2, is interpreted to mean that the Security Council may remind the parties in general terms, of their obligation under Article 33, paragraph 1; whereas, under Article 36, paragraph 1, it may recommend a definite procedure for the settlement of the dispute or the adjustment of the situation.

According to the wording of Article 36, paragraph 1, the Security Council may make these recommendations ' at any stage ' of a dispute or a situation. As far as disputes are concerned, this provision is as inconsistent with the provisions of Article 33, paragraph 1, as is Article 34, for it authorises the Security Council to intervene in a dispute before the parties have attempted to solve it by means of their own choice. That the Council has the power to make recommendations ' at any stage ' of a dispute or situation is problematical also, because this implies the right of the Council to make the recommendations referred to in Article 36, paragraph 1, even before Article 34 has been applied. But it is difficult to interpret paragraph 1 of Article 36 literally. For the Council is authorised by this paragraph expressly to make certain recommendations, not with respect to all disputes or situations, but only with respect to those ' of the nature referred to in Article 33 ', and that means disputes or situations the continuance of which is likely to endanger the maintenance of international peace and security. Consequently, the Security Council cannot make a recommendation under Article 36, paragraph 1, ' at any stage ' of a dispute or situation, but only after it has determined that the continuance of the dispute or situation is likely to endanger international peace and

the Franco regime be terminated by each Member of the United Nations. (c) The taking of appropriate steps by the Secretary-General to communicate these recommendations to all Members of the United Nations and all others concerned '. (*Yearbook of the United Nations*, 1946–1947, p. 348.) There can be little doubt that the actions referred to under (a) and (b) are by no means compatible with Art. 36, para. 1, authorising the Security Council to recommend appropriate procedures or methods of adjustment. Cf. the critical remarks of the delegate of the United Kingdom at the 40th meeting of the Security Council. (*Journ. of the Security Council*, 1st year, No. 39, p. 762.)

security. This is exactly the purpose of the investigation to be made under Article 34. Without such investigation, there is no sufficient reason to consider the dispute or situation as being ' of the nature referred to in Article 33 '. Consequently, Article 36 can properly be applied only after Article 34 has been applied. But such investigation can be made quite informally by the Council itself, without appointing a special commission of investigation. As pointed out, Article 37, paragraph 2, too, can be applied only after an investigation under Article 34 has led the Security Council to the conclusion that the continuance of the dispute is in fact likely to endanger the peace. Hence, Article 34 and Article 33, paragraph 2, or Article 34 and Article 36 belong together, just as Article 33, paragraph 1, and Article 37 do. Article 34—except when applied to the procedure regulated by Article 33, paragraph 1, and Article 37—represents the first stage of the ex officio procedure instituted by the Security Council on its own initiative.

After the investigation made under Article 34 has brought a positive result, in case of a dispute the Security Council has the choice between Article 33, paragraph 2, and Article 36. It may apply the one or the other, or first Article 33, paragraph 2, and then Article 36. In case of situations which have not the character of a dispute, the Security Council can apply only Article 36, not Article 33, paragraph 2.

The competence of the Security Council in the procedure under Article 34, Article 33, paragraph 2, and Article 36— in contradistinction to its competence in the procedure under Article 33, paragraph 1, and Article 37, and the procedure under Article 38—does not depend on the parties to the dispute. When the Security Council on its own initiative has, under Article 34, placed on its agenda and investigated the dispute and determined its dangerous character, the parties cannot withdraw the dispute from the Council. The Council may keep the matter on its agenda as long as it deems necessary. Even if the parties declare that they have settled the dispute and hence, a ' dispute ' in the sense of Article 33 no longer exists, the Security Council may remain seised with the matter as with a ' situation ' likely to endanger the maintenance of the peace.

In open contradiction to the principle underlying the procedure regulated by Article 33, paragraph 1, and Article 37, the Security Council may, under Article 34, investigate a dispute in spite of the fact that the parties have already begun to settle their dispute by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other

peaceful means of their own choice. The Security Council, after having determined the dangerous nature of the dispute, may recommend appropriate procedures or methods of adjustment (' adjustment ' probably meaning also ' settlement '), even if the parties have submitted the dispute to an International Tribunal of Arbitration or the International Court of Justice. The wording of Article 36, paragraph 1, does not exclude such possibility. Paragraphs 2 and 3 of this Article, it is true, provide that the Security Council should (not ' shall ') ' take into consideration any procedures for the settlement of the dispute '—nothing is said with respect to ' situations '—' which have already been adopted by the parties ', and ' that legal disputes should, as a general rule, be referred by the parties to the International Court of Justice, in accordance with the provisions of the Statute of the Court '. Whatever these provisions may mean, their wording does not bind the Security Council to wait with its recommendations until the procedure adopted by the parties themselves has failed, and to refrain from any interference if the dispute has been submitted by the parties to the court or another International Tribunal. It is, for instance, not incompatible with the wording of Article 36, that the Security Council may recommend that the parties refer the dispute, already submitted to an International Conciliation Commission, to the court, because the Security Council considers the dispute to be a legal, and not a political, one; or recommend that the parties refer the dispute, already submitted to an International Tribunal of Arbitration or to the International Court of Justice, to the Security Council, because the Council considers the dispute to be a political and not a legal one. If this was not the intention of the legislator—which is probable—he has formulated paragraphs 2 and 3 of Article 36 in a most unsatisfactory way. The wording of these provisions, however, is clear enough to ascertain that the Security Council has no power by itself to refer the dispute to the International Court of Justice. This can be done only ' by the parties '.

Since Article 36 refers not only to disputes between members but also to disputes between members and non-members, and even to disputes between non-members, it could happen that the Security Council might be dealing with a dispute between two States of which one, or both, are not parties to the Statute of the International Court of Justice. According to the wording of Article 36, paragraph 3, the Security Council may recommend even in such a case to the parties to refer the dispute—if it is a legal dispute according to the opinion of the Council—to the International Court of Justice. But the State which is not a party to the Statute can

refer its dispute to the court only if it fulfils the requirements of Article 35, paragraph 2, of the Statute.[9]

Although the wording of Article 36, paragraph 1, implies the possibility of the Security Council recommending that the dispute

[9] At its 127th meeting the Security Council, in the Corfu Channel case, recommended under Art. 36, para. 3, ' that the United Kingdom and the Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court '. (Security Council, *Official Records*, 2nd year, No. 34, pp. 726 f.) The Council did not adopt a formal decision to the effect that it considered the dispute to be a legal one. The fact that Albania is not a party to the Statute was not mentioned in the discussion. But the Australian delegate made the following statement, in order to justify the jurisdiction of the court: ' Under Article 25 of the Charter a Member agrees " . . . to accept and carry out the decisions of the Security Council . . .". Under Art. 36, " the Security Council may . . . recommend appropriate procedures or methods of adjustment " of a dispute. And under the same Article, the general rule is stated ". . . that legal disputes "—and this is now a legal dispute—" should . . . be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court ". That reference implies an acceptance of jurisdiction. Furthermore, in the letter of invitation sent by this Council to the Government of Albania, there is one vital condition laid down: ". . . to participate without a vote in the proceedings with regard to this dispute on condition that Albania accepts, in the present case, all the obligations which a Member of the United Nations would have to assume in a similar case ". Therefore, any decision, any recommendation that we may make binds the United Kingdom and also binds Albania. In addition, Art. 36 of the Statute of the International Court of Justice provides for the jurisdiction of the court as follows: " . . . comprises all . . . matters specially provided for in the Charter of the United Nations . . .". Consequently, we arrive at this conclusion: under provisions of both the Charter of the United Nations and the Statute of the Court, the Security Council is clearly entitled to make such a recommendation . . . ' .

This interpretation of the Charter and the Statute is rather problematical. First of all, it is doubtful whether a recommendation made by the Security Council under Art. 36 of the Charter is a decision binding upon the members in the sense of Art. 25. If it is a mere ' recommendation ', it cannot be considered to be a binding ' decision '. Hence, the fact that Albania has accepted ' in the present case all the obligations which a Member of the United Nations would have to assume in a similar case ', does not constitute an obligation of Albania to comply with the recommendation of the Council to refer the dispute to the court. If Albania was willing to do so, it had to comply with Art. 35, para. 2, of the Statute, which provides that the conditions under which the court shall be open to States, not parties to the Statute, shall be laid down by the Security Council, and with the resolution which the Security Council, pursuant to Art. 35, para. 2, of the Statute, adopted on October 15, 1946. This resolution stipulates that the International Court of Justice shall be open to a State which is not a party to the Statute upon the condition ' that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the court, in accordance with the Charter of the United Nations, and with the terms and subject to the conditions of the Statute and Rules of the court, and undertakes to comply in good faith with the decision or decisions of the court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter '. The declaration prescribed by this resolution cannot be substituted by the declaration which the Albanian Government made in order to be invited to participate in the discussion of the case in the Security Council under Art. 32 of the Charter. The provision of Art. 36, para. 1, of the Statute, that the jurisdiction of the court comprises ' all matters specially provided for in the Charter ', does not apply to the dispute between Great Britain and Albania; it refers to provisions of the Charter by which the jurisdiction of the court is established. However, neither Art. 36 nor Art. 32 of the Charter contain a provision by which the jurisdiction of the court is established.

should be referred to the Council itself, it is doubtful whether the Council can settle the dispute referred to it in compliance with this recommendation. For, as pointed out, the Council is authorised to recommend terms of settlement only under Article 37, paragraph 2, and Article 38, that is to say, in case the dispute has been referred to it under these Articles. In case of a situation which has not the character of a dispute, and whose dangerous nature has been determined under Article 34, the Council is not bound to take into consideration any procedure which had already been adopted by the parties concerned for its adjustment, nor is the Council authorised to recommend terms of adjustment itself.

After the Security Council has, on its own initiative or on the initiative of any other authority, except the parties themselves, investigated a dispute, determined its dangerous character under Article 34, and recommended appropriate procedures or methods of adjustment under Article 36, paragraph 1, and after the parties have failed to settle the dispute by the means recommended to them by the Security Council, the question arises whether Article 37, paragraph 1, applies, that is to say, whether the parties are obliged to refer such dispute to the Council. Strange as it may seem, the answer to this question is, according to the wording of Article 37, paragraph 1, in the negative. For the provision of this paragraph refers expressly to disputes which the parties fail to settle by the means indicated in Article 33, paragraph 1. These are means 'of their own choice' not means recommended to them by the Security Council under Article 36, paragraph 1. The, probably unintentional, effect of the wording of Article 37, paragraph 1, is that a dispute which the parties fail to settle cannot be shifted from the procedure regulated by Article 34, Article 33, paragraph 2, and Article 36, to the procedure regulated by Article 33, paragraph 1, and Article 37, the only procedure (except the one under Article 38 of Chapter VI that can be terminated by a recommendation of terms of settlement by the Security Council.

The procedure regulated by Article 34, Article 33, paragraph 2, and Article 36 may be instituted by the Security Council on the initiative of others rather than of the Security Council itself.

Article 35 stipulates:

> 1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.
>
> 2. A State which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it

accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Like Article 34, Article 35, paragraph 1, refers to any dispute, but only to situations not having the character of a dispute which might lead to international friction or give rise to a dispute. Under this paragraph, a procedure for settlement of disputes by the Security Council may be initiated by 'any Member of the United Nations'. The wording comprises also the members which are parties to a dispute, and thus is not consistent with Articles 33 and 37, which obligate the parties first to seek a solution by peaceful means of their own choice and to go to the Security Council—under Article 37, paragraph 1—only after they have tried in vain to settle it in this way. It might be objected that fulfilling this obligation is not incompatible with bringing the dispute to the attention of the Security Council, since this is different from 'referring' the dispute to the Council under Article 37, paragraph 1. However, to bring a dispute to the attention of the Security Council can have no other purpose than to give the Council the opportunity of dealing with the dispute under Article 35, paragraph 1, to investigate it under Article 34, and to make recommendations under Article 36; that is to say, to enable the Security Council to start an ex officio procedure under Article 34 and Article 33, paragraph 2, or Articles 34 and 36. This results especially from paragraph 2 of Article 35, where a non-member is authorised 'to bring to the attention of the Security Council or of the General Assembly' any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the Charter. The last requirement would be superfluous if the meaning of the formula 'to bring to the attention' were not to give to the Council the opportunity of initiating ex officio the procedure finally leading to recommendations under Article 36. However, to bring a dispute (or another situation) to the attention of the Security Council under Article 35, paragraphs 1 or 2, differs from referring a dispute to the Council under Article 37, paragraph 1, in so far as a State party to a dispute may bring, in accordance with the wording of Article 35, paragraph 1, the dispute before the Security Council without having sought a solution in accordance with Article 33, paragraph 1. For if this provision is applied, the dispute has to be brought before the Council under Article 37, paragraph 1, not under Article 35, paragraphs 1 or 2. According to the wording of the Charter, the

provision of Article 33, paragraph 1, applies only to the procedure regulated by this Article in connection with Article 37.[10] Consequently, if Article 35, paragraph 1, is interpreted—according to its wording—to apply also to members which are parties to the dispute, it is more convenient to the party to the dispute to bring it before the Security Council under Article 35, paragraph 1, than under Article 37, paragraph 1.[11] But if a party brings a dispute before

[10] During the discussion of the Greek case which was brought to the attention of the Security Council by Greece as a 'situation' under Art. 35, para. 1 (but was declared by the President of the Council to be a dispute (cf. Note 7, *supra*)), the delegate of Poland stated 'that since, by implication, we have decided that the case before us is in the nature of a dispute, before we take further decisions we must comply with Art. 33 of the Charter, which says that in case of disputes the parties shall seek all methods of adjustment before they call upon the Security Council to take a decision'. (Security Council, *Official Records*, 1st year, 2nd Series, No. 28, p. 652.)

During the discussion of the Corfu Channel Incidents case, which was brought to the attention of the Security Council by Great Britain as a party to the dispute under Art. 35, para. 1 (Security Council, *Official Records*, 2nd year, Suppl. No. 3, Annex 8, p. 36), and decided by the Council under Art. 36, the delegate of the Soviet Union declared himself against the proposal for inclusion of the case in the agenda of the Security Council because Great Britain did not comply with the provisions of Art. 33, para. 1. The representative of Great Britain, in spite of the fact that his Government had brought the dispute with Albania to the attention of the Security Council under Art. 35, para. 1, asserted that Great Britain had complied with the provision of Art. 33, para. 1 (Security Council, *Official Records*, 2nd year, No. 6, pp. 115 f.; No. 18, pp. 366, 376). But at the same time he referred to Art. 36, para. 1, which says: 'The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or a situation of like nature, recommend appropriate procedures or methods of adjustment'; that is to say, he called the attention of the Council to the fact that Art. 36 is in conflict with Art. 33, para. 1. The delegate of Brazil maintained that Arts. 35 and 36 of the Charter 'are applicable only, first, when the requirements of Art. 33, calling for peaceful adjustment, have been complied with, and, secondly, when the dispute or situation is likely to endanger the maintenance of international peace and security'. (Security Council, *Official Records*, 2nd year, No. 32, p. 687.) As to the second condition, the statement is correct; but the statement that Art. 35, para 1, and Art. 36 apply only when the requirements of Art. 33, para. 1, have been complied with, has no basis in the Charter.

[11] Until now, three 'disputes' have been brought before the Security Council: the Iranian case, the Syria-Lebanon case, and the Corfu Channel Incidents case; all three by a member, party to the dispute, under Art. 35, para. 1. In the Syrian and Lebanon case the delegates of the two States, in a letter dated February 4, 1946, to the Secretary-General, stated that they, 'acting on the instructions of their Governments, have the honour, in accordance with Article 34 of the Charter, to bring this dispute to the attention of the Security Council, and to request it to adopt a decision recommending the total and simultaneous evacuation of the foreign troops from the Syrian and Lebanese territories'. (*Journ. of the Security Council*, 1st year, No. 8, p. 139.) Under Art. 34 no dispute or situation can be brought before the Council. But the words 'bring this dispute to the attention of the Security Council' are a quotation of Art. 35, para. 1. At the 19th meeting of the Security Council the President declared: 'By the letter of February 4, these two delegations have exercised their right as Members of the United Nations under paragraph 1 of Article 35 of the Charter, to bring to the attention of the Council a certain matter'. (*Journ. of the Security Council*, 1st year, No. 15, p. 265.) The request made in the letter that the Security Council should recommend the evacuation of the foreign troops, is a request to recommend terms of settlement; which is possible neither under Art. 34 nor under Art. 35, para. 1, but only if the dispute is referred to the Security Council under Art. 37.

the Council under Article 35, paragraph 1, it cannot expect that the Council will act under Article 37, paragraph 2. For the Council can act under Article 37, paragraph 2, only if the dispute is referred to it under paragraph 1 of that Article. When invoked under Article 35, paragraph 1, the Council can act only under Articles 35, 34 and 36, that is to say, the Council can make only recommendations of procedures or methods of adjustment, not recommendations of terms of settlement. Besides, since any dispute is a situation, a member party to a dispute may evade the provisions of Article 33, paragraph 1, and Article 37, paragraph 1, by bringing a case which, in fact, is a dispute, as a ' situation ' to the attention of the Security Council under Article 35, paragraph 1.[12]

Another difference which exists between bringing a dispute before the Security Council under Article 35, paragraph 1, and bringing a dispute before the Council under Article 37, paragraph 1 (or Article 38), is, that in the first case the procedure of the Council is an ex officio procedure, whereas in the second case the procedure of the Council depends on the parties to the dispute. To ' bring to the attention ' of the Security Council (or of the General Assembly) a matter, does not mean to bind the Council (or the Assembly) to intervene. Everybody may bring to the attention of the Council (or of the Assembly) anything. Nothing in the text of Article 35 allows the interpretation that the Council (or Assembly) is bound to deal with a dispute or a situation brought to its attention under Article 35. The position of the Security Council under Article 35 is

[12] This was the case when Greece brought to the attention of the Security Council its conflict with Yugoslavia, Bulgaria and Albania under Art. 35, para. 1, as a ' situation ' which is leading to ' friction with her neighbours '. (Security Council, *Official Records*, 1st year, 2nd Series, Suppl. No. 10, Annex 16, pp. 169 f.) But the Security Council through its President declared the case to be a dispute. (Security Council, *Official Records*, 1st year, 2nd Series, No. 26, p. 60; cf. also No. 28, p. 652.) The resolution suggested by the representative of the United States followed closely the text of the proposals made by the commission of investigation established by the Security Council in the Greek case. The commission proposed to the Council among others ' that it should recommend to the Governments of Greece on the one hand and Albania, Bulgaria and Yugoslavia on the other, to do their utmost to establish normal good-neighbourly relations, to abstain from all action direct or indirect which is likely to increase or maintain the tension and unrest in the border areas, and rigorously to refrain from any support, overt or covert, of elements in neighbouring countries aiming at the overthrow of the lawful governments of those countries . . . '. (*Yearbook of the United Nations*, 1946–1947, p. 371.) The delegate of the United States proposed that the Security Council should resolve: ' The Security Council adopts the proposals made by the majority of the Members of the Commission . . .'. (*Ibid.*, p. 374.) By such a resolution the Security Council would have recommended ' terms of settlement ', possible only in case the Council acts under Art. 37, para. 2, not mere ' procedures or methods of adjustment '. But the proposition of the delegate of the United States was not adopted by the Council, although nine members voted in favour of it. Since the Soviet Union voted against it, the resolution failed to pass. (Doc. S/P.V. 170; cf. *International Organisation*, published by World Peace Foundation, Vol. 1, No. 3, p. 503.)

not different from that under Article 34: it is upon the Council to decide, in its discretion, whether it will place the dispute or the situation on its agenda, and thus institute the ex officio procedure which ultimately leads to recommendations under Article 36. This procedure does not depend—as does the procedure under Article 37, paragraph 2, and under Article 38—upon the parties. Under Article 35, paragraph 1, a member that is not at all a party to the dispute or involved in the situation, may bring the matter to the attention of the Security Council. Hence, the State which has brought a dispute (or another situation) to the attention of the Council under Article 35, paragraph 1, cannot withdraw the matter from the attention of the Council; whereas the parties which have referred a dispute to the Council under Article 37, paragraph 1, or under Article 38, may do so.[13]

[13] The question as to the effect of the withdrawal of a case from the Security Council arose during the consideration of the dispute between Iran and the Soviet Union. In a letter from the Iranian Ambassador to the Secretary-General, dated April 9, 1946, the statement was made 'that the Iranian Government has complete confidence in the word and pledge of the Soviet Government, and for this reason withdraws its complaint from the Security Council'. (*Journ. of the Security Council*, 1st year, No. 26, p. 498.) Previously the delegate of the Soviet Union had requested that the Iranian case should be removed from the agenda of the Security Council.

If it is assumed that the Iranian case was under consideration by the Security Council as a dispute brought to the attention of the Council under Art. 35, para. 1, it is hardly correct to speak of a 'complaint', as did the Iranian Ambassador in his letter of April 9, 1946, and the Secretary-General in his communication to the President of the Security Council. Under Chapter VI of the Charter, no State can make a 'complaint' against another State; and, consequently, no State can withdraw a 'complaint' from the Security Council. This applies especially in case a dispute or situation has been brought to the attention of the Council under Art. 35, para. 1. According to this provision a member may bring to the attention of the Security Council a dispute to which it is not a party and, hence, has no complaint at all in the matter.

Although a State which has brought a dispute or a situation to the attention of the Council under Art. 35, para. 1, cannot withdraw a complaint, because it has not made a 'complaint', it could make a declaration to the effect that it withdraws the dispute of the situation from the attention of the Council. But such an act could not have any effect since the Council may give its attention to the matter even if it were not brought to its attention by the State which now wishes to withdraw the case. Such a declaration is particularly without any effect when the Council has already given its attention to the matter, as in the case of the dispute between Iran and Soviet Russia. And this even before the Council has undertaken an investigation under Art. 34. The Council can deal with a matter, it can discuss it, without making an investigation. It must discuss it before adopting a decision under Art. 34. For a recommendation to be made without formally investigating the matter is certainly improper; but it is not illegal, since the Charter does not stipulate that recommendations must not be made without previous investigation. The argument that if a party to the dispute has withdrawn its 'complaint' no dispute exists and, hence, Art. 36 cannot be applied, is not convincing. For whether a dispute still exists or not, it is for the Security Council to decide, and even if no dispute existed—according to the opinion of the Security Council—the latter could deal with the case as with a 'situation'.

Totally different is the situation in case a dispute has been 'referred' to the Security Council under Art. 37, para. 1, by the parties. The parties who refer a dispute to the Council can withdraw this dispute from the Council, because, in this case, the Council's jurisdiction is based on the action of the parties.

In order to reconcile the provision of Article 35, paragraph 1, that any member may bring a dispute to the attention of the Security Council, with the provision of Article 33, paragraph 1, and Article 37, paragraph 1, that the parties shall refer the dispute to the Security Council only after having tried to settle it by means of their own choice, it would be advisable to interpret Article 35, paragraph 1—in conformity with the spirit of Chapter VI, though not with the wording of Article 35, paragraph 1—to mean that only members which are not parties to a dispute may bring the dispute to the attention of the Security Council, whereas to members which are parties to the dispute, Article 33, paragraph 1, and Article 37 apply. If this interpretation is accepted, then Article 35, paragraph 1, establishes a procedure for the settlement of disputes different from that regulated by Article 33, paragraph 1, and Article 37, and that regulated by Article 38, in so far as the first-mentioned procedure is initiated by any member of the United Nations, whereas the second and third procedures are initiated by the parties to the dispute. The procedure initiated by any member under Article 35, paragraph 1, however, can lead only to an ex officio procedure under Articles 34 and 33, paragraph 2, or Articles 34 and 36 (or, under Article 39).[14]

Whereas, in case a dispute has been brought to the attention of the Council under Art. 35, para. 1, the jurisdiction of the Council is based on its own decision to deal with the matter.

At its meeting on April 23, 1946, the Security Council rejected the motion of the representative of the Soviet Union (amended by the representative of France) that the Iranian question should be removed from the agenda of the Security Council. This decision was correct on the assumption that the Iranian question was under consideration by the Security Council under Art. 35, para. 1, of the Charter. Cf. Note 11.

[14] The conflict between Iran and the Soviet Union was brought before the latter by a note from the Iranian delegation of January 19, 1946, which enclosed the following statements:

> Owing to interference of the Soviet Union, through the medium of their officials and armed forces, in the internal affairs of Iran, a situation has arisen which may lead to international friction.
>
> In accordance with Art. 33 of the Charter of the United Nations the Iranian Government have repeatedly tried to negotiate with the Government of the Soviet Union, but have met with no success.
>
> Accordingly, the Iranian delegation to the General Assembly of the United Nations on behalf of the Iranian Government, have the honour to request you, in accordance with the terms of Art. 35 (1) of the Charter, to bring the matter to the attention of the Security Council so that the Council may investigate the situation and recommend appropriate terms of settlement.

The Iranian note does not refer to a dispute but to a 'situation', and brings the matter under Art. 35, para. 1, to the attention of the Council. On the other hand, the Iranian Government maintains to have fulfilled the requirements of Article 33 which presupposes the existence of a dispute, and requests the Council not only to make an investigation—which is consistent with Art. 35, para. 1—but also to recommend terms of settlement, which is possible only if the matter is a dispute, and if it is referred to the Security Council under Art. 37, para. 1. In a second note of January 26, 1946 (*Journ. of the Security Council*, No. 4, p. 37), the Iranian delegation again referred to Art. 35 (in the text published in the *Journal* Art. 25 is referred to, which is

Whereas a member may, under Article 35, paragraph 1, bring 'any dispute' whatever to the attention of the Security Council, only 'situations' 'of the nature referred to in Article 34' are subjected to this rule. Since the action of the member by which the

probably a misprint) and asked that the 'dispute' should be investigated. The representative of the Soviet Union argued that there was no foundation for consideration by the Security Council of the substance of the Iranian communication. His main argument was that the provision of Art. 33, para. 1, had not yet been complied with. (*Journ. of the Security Council*, No. 5, pp. 53 ff.) The Security Council discussed the dispute and adopted in its meeting of January 30, 1946, the following resolution:

> 'The Security Council, having heard the statements by the representatives of the Soviet Union and Iran in the course of its meetings of January 28 and 30, and
>
> Having taken cognisance of the documents presented by the Soviet and Iranian delegations and those referred to in the course of the oral debates;
>
> Considering that both parties have affirmed their readiness to seek a solution of the matter at issue by negotiations; and that such negotiations will be resumed in the near future,
>
> Requests the parties to inform the Council of any results achieved in such negotiations. The Council in the meanwhile retains the right at any time to request information on the progress of the negotiations'. (*Journ. of the Security Council*, 1st year, No. 6, pp. 82 f.)

In adopting this resolution the Security Council took none of the measures expressly mentioned in Chapter VI of the Charter. It did not call upon the parties under Art. 33, para. 2, nor make an investigation under Art. 34, nor make recommendations under Arts. 36, 37, 38. But the resolution was interpreted by the representatives of the United Kingdom and the Soviet Union to mean a recommendation, made by the Council under Art. 36, paras. 1 and 2, to the parties to settle their dispute by direct negotiation. (Cf. *Journ. of the Security Council*, 1st year, No. 19, p. 370; No. 20, p. 386.)

The second phase of the Iranian-Russian affair was initiated by a note of the Iranian Ambassador to the Secretary-General of March 18, 1946, which enclosed the following statement:

> Pursuant to Art. 35, para. 1, of the Charter of the United Nations, Iran brings to the attention of the Security Council a dispute between Iran and the Union of Soviet Socialist Republics, the continuance of which is likely to endanger the maintenance of international peace and security. This dispute has arisen by reason of new developments since the adoption of the Security Council of the resolution of January 30, 1946, relating to the earlier dispute between the USSR and Iran. (*Journ. of the Security Council*, 1st year, No. 17, p. 352.)

By this note the dispute was brought to the attention of the Council under Art. 35, para. 1. But in its declaration before the Council on April 2, 1946, the representative of Iran said:

> I regret to inform the Council that to my knowledge no positive results [of the negotiations with the Soviet Union] have been achieved. I am instructed by the Government of Iran to refer the dispute to the Council for decision in accordance with the powers and duties of the Council. (*Journ. of the Security Council*, 1st year, No. 21, p. 428.)

And in his letter to the Secretary-General of April 2, 1946, the Iranian Ambassador stated: 'In closing permit me to repeat that in referring these disputes to the Council the Iranian Government' hopes 'that the Council will find a just solution which will promote friendly relations in the future'. (*Journ. of the Security Council*, 1st year, No. 23, p. 453.)

To 'refer' a dispute for 'decision' or 'just solution' to the Security Council after attempts to solve it have not achieved positive results, is possible only under Art. 37, para. 1. Hence, it may be doubted under which Article the dispute has been under consideration by the Council. In view of the first note of the Iranian Government addressed to the Security Council in the first phase of the dispute, and of its declaration before the Council in the second phase, it might be assumed that the dispute was referred to the Council under Art. 37, para. 1. But since this Government expressly quoted Art. 35, para. 1, it may

situation is brought to the attention of the security Council has for its purpose to initiate the procedure regulated by Article 34 and Article 33, paragraph 2, or Article 34 and Article 36 (and if the situation is brought to the attention of the General Assembly, a procedure under Article 11, paragraph 2), it is up to the Security Council (or the General Assembly) to determine the dangerous character of the situation. Hence the restriction to situations ' which might lead to international friction or give rise to a dispute ', as established in Article 35, paragraph 1, is quite superfluous. For the Security Council, when it places the dispute or the situation on its agenda, and undertakes an investigation under Article 34, can proceed to recommendations under Article 36 only if it finds, as a result of this investigation, that the dispute or the situation is ' likely to endanger the maintenance of international peace and security '. Hence, the condition under which a member is allowed to bring a situation to the attention of the Security Council : that the situation is ' of the nature referred to in Article 34 ', that is to say that the situation ' might lead to international friction or give rise to a dispute ', is not sufficient. The situation must endanger the peace in order to be the object of a recommendation of the Council. Prior to the Security Council's or the General Assembly's intervention, the question as to whether the situation is ' of the nature referred to in Article 34 ' can be decided only by the member which brings the situation to the attention of the Council or of the Assembly, and the member may consider any situation to be of this nature.

As to ' situations ' not having the character of disputes—in contradistinction to ' disputes '—no differentiation between members

also be assumed that this Article applies. That a party brings its own dispute to the attention of the Council under Art. 35, para. 1, is certainly compatible with the wording of that provision but inconsistent with the obligations under Art. 33, para. 1, ' first of all ' to ' seek a solution by means of their own choice ', and, after this attempt has failed, to refer the dispute under Art. 37, para. 1, to the Security Council. The conflict which arose between the Soviet Union and the Security Council with respect to the question as to whether the Council should deal with the dispute, is, at least, partly due to this inconsistency. In its declaration made at the 4th meeting of the Security Council on January 30, 1946, the representative of the Soviet Union rightly referred to the clear provisions of Art. 33, para. 1, and Art. 37. (*Journ. of the Security Council*, 1st year, No. 5, pp. 56 f.)

At its 30th meeting the Security Council adopted a resolution to the effect ' that the Council defer further proceedings on the Iranian appeal until May 6, at which time the Soviet Government and the Iranian Government are requested to report to the Council whether the withdrawal of all Soviet troops from the whole of Iran has been completed, and at which time the Council shall consider what, if any, further proceedings on the Iranian appeal are required '. (*Journ. of the Security Council*, 1st year, No. 24, pp. 458, 466.) This is an indirect recommendation of withdrawing the Soviet troops from Iran. It is an—indirect —recommendation of terms of settlement, which is possible under the Charter only when a dispute is referred to the Council under Art. 37, para. 1.

which are and those which are not involved in the situation is necessary. For Chapter VI does not contain a provision referring to States involved in a 'situation' analogous to the provision of Article 33, paragraph 1, referring to States parties to a dispute. Members involved in a situation which might lead to international friction, or give rise to a dispute, are not obliged first to seek, by means of their own choice, a solution. They, as well as any other member, may immediately bring the situation to the attention of the Security Council, which may proceed under Articles 34 and 36.

Article 35, paragraph 2, refers only to disputes and only to non-members parties to the dispute. Non-members are not authorised to bring 'situations' not having the character of disputes or disputes to which they are not parties, to the attention of the Security Council or of the General Assembly. The relation of Article 35, paragraph 2, to Article 33, paragraph 1, is highly problematical. For the latter, referring to 'any' dispute, may be interpreted to mean that it refers not only to disputes between members, but also to disputes between members and non-members, and between non-members. If Article 33, paragraph 1, and Article 37, paragraph 1, are interpreted in accordance with their wording, to apply also to disputes to which non-members are parties, then Article 35, paragraph 2 is even more inconsistent with Article 33, paragraph 1, than is Article 35, paragraph 1. Article 35, paragraph 2, authorises non-members to bring to the attention of the Security Council disputes to which they are parties, even before they have tried to settle them by means of their own choice. However, a non-member, party to a dispute, has to act under the Charter in the same way as a member: first in conformity with Article 33, paragraph 1; then in conformity with Article 37, paragraph 1. If it brings the dispute to the attention of the Security Council before having sought a solution under Article 33, it violates this provision.

It may be objected that even if this interpretation is considered to be correct, the provision of Article 35, paragraph 2 is necessary according to which a non-member has to accept in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the Charter. However, if, under Article 2, paragraph 6, States which are not members of the United Nations are obliged to act in accordance with the Principles of the Charter, especially in accordance with the Principles laid down in Article 2, paragraphs 3 and 4, it is superfluous to demand that a non-member should accept for the purposes of the dispute the obligations of pacific settlement provided in the Charter. These obligations are implied in Article 2, paragraphs 3 and 4, and are applicable to non-members under Article 2, paragraph 6. Besides, in this respect the text of Article

35, paragraph 2, is problematic also for another reason. According to its wording, it is the bringing to the attention of the Security Council or of the General Assembly which is conditioned by the acceptance of the obligations of pacific settlement. Such a provision cannot have any effect. A non-member cannot be prevented from bringing to the attention of the Organisation any matter whatever. What could be conditioned by the acceptance of the obligations of pacific settlement on the part of the non-member is only : that the Organisation may deal with the dispute brought to its attention. To deal with disputes to which non-members are parties, the Organisation, and especially the Security Council, is not bound by the fact that the dispute has been brought to its attention under Article 35, even if in the case of a dispute to which a non-member is a party, the non-member has accepted in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the Charter. When the Security Council has, in its discretion, taken up the dispute, it has, under Article 32, to invite the non-member to participate, without vote, in the discussion relating to the dispute. Then the Council has to lay down such conditions as it deems just for the participation of the non-member. This is the right moment to require that the non-member, in order to participate, should accept the obligation of pacific settlement.

The provision of Article 35, paragraph 2, that a non-member State must accept in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the Charter, applies only to disputes brought to the attention of the Security Council or of the General Assembly by this non-member, and only to this State. However, under Article 35, paragraph 1, a member State may bring to the attention of the Security Council or the General Assembly a dispute between a member and a non-member, or a dispute between two non-members. In these cases, under Article 35 the non-member States need not accept in advance the obligations of pacific settlement provided in the Charter. Under Article 35, paragraph 2, a non-member State may bring to the attention of the Security Council or of the General Assembly not only a dispute to which this non-member and a member are parties, but also a dispute to which the other party which does not bring the dispute to the attention of the Security Council is also a non-member. In this case, under Article 35, only the non-member which brings the dispute before the Organisation, not the other non-member, has to accept in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the Charter. Since such acceptance can be required only in order to justify the application of the provisions of the Charter concerning the pacific

settlement of disputes to non-member States, it is, at least, inconsistent to restrict the acceptance of the obligations concerned to the non-member which brings the dispute before the Organisation. However, under Article 32, the Security Council may require acceptance of the obligations of pacific settlement from any non-member party to a dispute under consideration by the Council, whether the non-member has, or has not, brought the dispute to the attention of the Council. Although disputes to which non-members are parties may be also under consideration by the General Assembly, there is no provision in the Charter analogous to Article 32 referring to these disputes.

(c) Procedures instituted by the General Assembly and by the Secretary-General

The procedure for settlement of disputes and adjustment of other situations regulated by Article 34, Article 33, paragraph 2, and Article 36, may be initiated not only by the Security Council itself and by members and non-members, but also by the General Assembly and the Secretary-General.

Under Article 11, paragraph 3, 'the General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security'. Since the term 'situation' is not used in connection with 'disputes', it may be interpreted to include the latter. After the attention of the Security Council has been called by the General Assembly to a situation, the Council may, under Article 34, make an investigation of the situation. The purpose of this investigation is—as pointed out —to determine whether the continuance of the situation is likely to endanger the maintenance of international peace and security. If the investigation has a positive result, the Security Council may apply Article 36. The investigation, however, may have a negative result. The Security Council may determine that the situation is not likely to endanger international peace and security and consequently take no action at all. There might thus exist a conflict of opinion between the Security Council and the General Assembly. In this case, the General Assembly itself may take action with respect to the situation under Article 10 or Article 11, paragraph 2, that is to say, it may discuss the situation and make recommendations with regard to it. The General Assembly, it is true, is not expressly authorised by the Charter to investigate the situation; but in order to fulfill the function conferred upon it by Article 11, paragraph 3, and to determine whether the situation is likely to endanger international peace and security, the Assembly may

examine the situation in discussing it, in asking for written statements of the parties involved in the situation, and even in establishing, under Article 22, a special organ authorised to examine the situation and to report to the Assembly. But the members are not obliged to permit such examination, especially not on their own territory since, as pointed out, there is no provision regarding the decisions of the General Assembly analogous to that of Article 25, by which the members are obliged to accept and carry out the decisions of the Security Council.

If a State—member or non-member—has brought before the General Assembly a dispute or another situation under Article 35, paragraph 1, the Assembly may discuss it and make recommendations with regard to it. But if 'action is necessary' with respect to the dispute or the situation, the Assembly, under Article 11, paragraph 2, 'shall' refer it to the Security Council 'either before or after discussion'. In order to determine that 'action is necessary', the General Assembly may apply the same methods as those that are at its disposal for determining that a situation is likely to endanger the peace. When a dispute or another situation has been referred by the Assembly to the Council under Article 11, paragraph 2, the latter may with respect to the dispute or situation apply Articles 34 and 36, or—as we shall see later—Article 39. But the Council may decide that no action is necessary. Then, again, a conflict of opinion will arise between the two organs. In this case, however, the General Assembly cannot take the action which it deems necessary. For 'action' means here enforcement action, which can be taken only by the Security Council.

Article 99 provides :

> The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Under this Article, the Secretary-General may bring to the attention of the Security Council any dispute or any other situation of the nature referred to in this Article, and the Council may employ the procedure regulated by Article 34, Article 33, paragraph 2, and Article 36, or apply Article 39.

(D) PROCEDURE FOR SETTLEMENT OF LOCAL DISPUTES

A special procedure seems to be established by Article 52 for the settlement of so-called 'local disputes', that is to say, disputes between States which are parties to a regional arrangement.

Article 52 runs as follows :

> 1. Nothing in the present Charter precludes the existence

of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the States concerned or by reference from the Security Council.

4. This Article in no way impairs the application of Articles 34 and 35.

Paragraph 2 of Article 52 is paralleled by Article 33, paragraph 1, providing that ' the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice '. The two provisions, however, are not quite consistent. According to Article 33, paragraph 1, the parties to a dispute, even if parties to a regional arrangement, have the choice among the means of settlement indicated in this Article. According to Article 52, paragraph 2, States which enter into the regional arrangement referred to in paragraph 1, ' shall ' make every effort to achieve pacific settlement of local disputes, that is to say, disputes between parties to the regional arrangements, through such regional arrangements, and if the arrangements establish a special agency, through this agency. That means that—according to the wording of Article 52, paragraph 2—members of the United Nations, if they enter into the regional arrangements referred to in Article 52, paragraph 1, are obliged to insert into the text of the arrangement provisions for the pacific settlement of disputes arising between them, and, if the arrangement constitutes a special agency, to confer upon this agency the competence to settle such disputes. Under Article 52, paragraph 2, the parties to a local dispute do not have the choice among the means of pacific settlement which States have under Article 33, paragraph 1. The provision of Article 52, paragraph 2, concerning settlement of local

disputes, refers to all regional organisations; but Article 52, paragraph 1, authorises the establishment of regional organisations not only for settlement of local disputes, but also for other purposes; for instance, for economic or political purposes, such as 'regional arrangements against renewal of aggressive policy on the part of any former enemy State', referred to in Article 53, paragraph 1. Under Article 52, paragraph 2, members of the United Nations, if they have entered into a regional arrangement, are obliged 'to make every effort to achieve pacific settlement' of all local disputes; whereas according to Article 33, paragraph 1, States are obliged to seek peaceful settlement by means of their own choice not for all disputes, but only for disputes the continuance of which is likely to endanger the maintenance of international peace and security.

The inconsistency between Article 33, paragraph 1, and Article 52, paragraph 2, raises the question whether Article 33, paragraph 1 must be interpreted as being restricted by Article 52, paragraph 2. This question may be answered in the affirmative, since Article 52, paragraph 4, contains a reference to the provision of Chapter VI in providing that Article 52 'in no way impairs the application of Articles 34 and 35'. From the fact that Article 33 is not referred to, it might be concluded that the application of this Article is impaired by Article 52, paragraph 2, so that Article 33, paragraph 1, is to be applied only to parties to local disputes in so far as consistent with Article 52, paragraph 2. This interpretation, however, is only possible, not necessary, since the fact that only Articles 34 and 35 are mentioned in Article 52, paragraph 4, does not necessarily mean that Article 52 impairs the application of those Articles in Chapter VI which are not expressly mentioned.

Still less consistent with the provisions of Chapter VI concerning the pacific settlement of disputes is paragraph 3 of Article 52. In addition, this paragraph is hardly consistent with paragraph 2 of the same Article. It is difficult to understand how the Security Council shall encourage the development of the pacific settlement of local disputes through regional arrangements, after paragraph 2 has imposed upon the members parties to a regional arrangement the strict obligation to make every effort to achieve the pacific settlement of all local disputes through such regional arrangements. It is difficult to understand how such encouragement could be given on the initiative of the States concerned if the States concerned are under the obligation of paragraph 2. And it is not completely understandable how the Security Council, in conformity with the procedure laid down in Chapter VI, can 'refer' a dispute for settlement to the parties to the regional arrangement or to the agency established by this arrangement. Under the provisions of Chapter

VI, the Security Council can only recommend appropriate procedures or methods of adjustment (Article 36, paragraph 1 and Article 37, paragraph 2) or terms of settlement (Article 37, paragraph 2 and Article 38). In case a local dispute is before the Security Council, the latter may, under Article 36, paragraph 1, recommend to the parties to settle the dispute by resort to their regional arrangement or the regional agency if such agency is established by the arrangement. It is even doubtful whether in such a case a 'recommendation' is appropriate in view of the strict obligation established by Article 52, paragraph 2. It is also doubtful whether the Security Council, if allowed to make any recommendation at all, may recommend any other method of adjustment than that through the regional arrangement or the regional agency if such agency exists, provided that the Council's power is considered to be restricted by Article 52, paragraph 2. In any case, under Chapter VI the Council cannot 'refer' the dispute to such agency. To 'refer' a dispute to a regional agency or directly to the parties to the regional arrangement if no regional agency is established, means to refer the settlement of the dispute to these authorities. This is certainly incompatible with the provisions of Chapter VI dealing with the settlement of disputes which are not settled by the parties themselves, that is to say, with Articles 37 and 38, according to which only the Security Council itself has the competence to recommend terms of settlement. It may be that the term 'reference from the Security Council' means—according to the intention of the legislator—only a recommendation to be made under Article 36, paragraph 1; that is to say, the Security Council shall recommend in case of local disputes resort to regional arrangements or regional agencies. If this was the intention of the legislator, it is certainly not properly expressed. But this interpretation, too, involves a restriction of the power conferred upon the Security Council by Article 36, paragraph 1. Be that as it may, 'reference from the Security Council' as provided for in Article 52, paragraph 3, is possible only if, in case of local disputes, Article 52 and not the procedures laid down in Chapter VI apply; or if the latter apply only in so far as they are consistent with Article 52. As pointed out, the provision of Article 52, paragraph 4 may, but need not necessarily, be interpreted in this way. However, if it was intended to restrict the provisions of Chapter VI by the provisions of Article 52, that is to say, to organise the procedure for the pacific settlement of local disputes in a way different from that for the settlement of other disputes, it was necessary to insert into Chapter VI a clause to this effect. For, the provisions of Chapter VI precede those of

Article 52 and are formulated in general terms covering all disputes, local disputes included.

If the formula 'reference from the Security Council' as used in Article 52, paragraph 3, means that the Security Council shall refer the settlement of local disputes brought before it to the States parties to a regional arrangement or to the regional agency established by this arrangement, paragraph 3 of Article 52 is hardly compatible with the provision of paragraph 2 of this Article according to which the parties to a local dispute are obliged to refer the dispute, and that means the settlement of the dispute, to the Security Council after they have made every effort to achieve pacific settlement through the regional arrangement or by the regional agency, and these efforts have failed. How can the Security Council refer a local dispute to the regional authorities if the parties to the local dispute are obliged to refer it to the Security Council? Such 'reference from the Security Council' is possible only before the parties to the local dispute have made any effort to achieve pacific settlement in conformity with Article 52, paragraph 2. But at this stage the Security Council, if it has to respect the provision of Article 52, paragraph 2, can only remind the parties of their obligation under this paragraph; it cannot 'refer' the dispute; that is to say, the Security Council cannot transfer its competence to settle it.

Article 52, paragraph 4, refers to the relation between the procedure for the pacific settlement of local disputes laid down in Article 52 and the procedure (or procedures) for the pacific settlement of all disputes laid down in Chapter VI. As pointed out, it is not clear why Article 52, paragraph 4, mentions only the application of Articles 34 and 35 as not being impaired by Article 52. But Article 52, paragraph 4, makes it sure that also local disputes may be investigated under Article 34 by the Security Council and may be brought to the attention of the Security Council or the General Assembly under Article 35, paragraph 1, by any member of the United Nations, and under Article 35, paragraph 2, by a non-member if it is a party to such local dispute. In case the local dispute is brought to the attention of the Security Council under Article 35, the Security Council may investigate the dispute. If the investigation—whether initiated by the Council itself under Article 34 or by a member or non-member under Article 35—has the result that the dispute is determined by the Security Council to be likely to endanger international peace and security, the Security Council may make recommendations under Article 36, paragraph 1, especially the recommendation to seek solution of the dispute by resort to the regional arrangement or

the regional agency. If it is assumed that not Article 36 but Article 52, paragraph 3, does apply in such case, the Security Council must 'refer' the settlement of the dispute to the parties of the regional arrangement or to the regional agency under Article 52, paragraph 3. If in spite of this reference, the local dispute cannot be settled by regional arrangements, the parties may refer the dispute back to the Security Council under Article 52, paragraph 2. It may, however, be argued that reference of a local dispute from the Security Council to regional arrangements excludes reference of such dispute from the parties to the Security Council. If this interpretation is accepted, Article 52, paragraph 2, obliging the parties to refer the dispute to the Security Council, applies only if the dispute has not been referred to the regional authorities by the Security Council under Article 52, paragraph 3. All this shows how confused the situation of local disputes is under the combined provisions of Chapters VI and VIII of the Charter.

(e) Settlement under Article 39

The Security Council has competence with respect to the settlement of disputes and adjustment of other situations not only under Chapters VI and VIII, but also under Chapter VII. Article 39 states:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Since this Article provides not only for enforcement measures but also authorises the Security Council, after having determined the existence of a threat to the peace or breach of the peace (including act of aggression), 'to make recommendations' of any kind, consequently also recommendations of the kind referred to in Article 36 or 37, this provision establishes another procedure for the settlement of disputes or adjustment of situations, provided the dispute or the situation involves a threat to the peace or breach of the peace. It will probably be applied only if the dispute or the situation involves a threat to the peace and not yet an open breach of the peace, since in the latter case only enforcement action seems to be adequate. The procedure under Article 39 differs from that under Chapter VI in that members of the Security Council, parties to the dispute, are not excluded from voting in the decision by which the existence of the threat

to or breach of the peace is to be determined, nor from the decision by which a recommendation is to be made.

(F) SETTLEMENT UNDER ARTICLE 94

Article 94, paragraph 2, of the Charter provides:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

This provision is of interest in this connection only in so far as it authorises the Security Council to 'make recommendations' with respect to a dispute which has already been decided by the International Court of Justice. The wording of Article 94, paragraph 2, does not impose upon the Security Council any restriction with respect to this recommendation. In making such a recommendation the Security Council is particularly not bound to conform with the decision of the court with which the party concerned did not comply. The wording of the provision, it is true, allows an interpretation according to which not only the word 'decide' but also the words 'make recommendations' refer to the words 'upon measures to be taken to give effect to the judgment'. But the other interpretation, according to which the Security Council is authorised to make any recommendation whatever is not only possible but grammatically more adequate. In accordance with this interpretation, the Security Council may recommend a solution of the dispute totally different from that decided by the court. This was the interpretation given to Article 94, paragraph 2, by the representative of the Department of State at the Hearings before the Committee on Foreign Relations of the United States Senate on the Charter of the United Nations. The Security Council may consider non-compliance with its recommendation under Article 94, paragraph 2, a threat to the peace and take enforcement action under Article 39 against the State which does not comply with the Council's recommendation, and thus enforce its recommendation instead of enforcing the court's decision. This means that Article 94, paragraph 2, confers upon the Security Council the power to substitute its recommendation for the court's judgment. This means, further, that the obligation imposed upon the members by Article 94, paragraph 1, and by the Statute of the court to comply with the decisions of the court, may be restricted by application of Article 94, paragraph 2. By having

recourse to the Security Council under Article 94, paragraph 2, the party places the court under the political control of the Council. Since under the Charter self-help is prohibited, non-compliance with the court's judgment by one party may compel the other party to have recourse to the Security Council under Article 94, paragraph 2. Such recourse may have the effect of transforming a legal dispute, decided by the court, into a political issue to be settled anew by the Council. This is certainly one of the most astonishing provisions of the Charter.

(g) Legal effect of recommendations of the Security Council

As to the legal effect of a recommendation made by the Security Council under Chapter VI or under Article 39, the term 'recommendation' indicates the intention of the legislator not to attach to this act of the Security Council any binding force. On the other hand, Article 25 stipulates the obligation of the members 'to accept and carry out the decisions of the Security Council in accordance with the present Charter'. If this provision is interpreted to refer to all decisions of the Security Council and if the term 'decision' is understood to mean any resolution adopted by the Council, the recommendations made by the Security Council—since adopted by 'decisions'—are not mere 'recommendations' but orders binding upon those whom they concern.[15] But another interpretation is also possible, according to which the term 'decisions' in Article 25 means only resolutions by which (according to the intention of the Council) binding norms are to be created. Decisions of the Security Council taken under Article 34 referring to an investigation, have certainly not the character of 'recommendations', and hence are in any case 'decisions' in the narrower sense of Article 25, and as such binding upon the State concerned. But 'recommendations' made under Articles 36, 37, and 38, have—according to this interpretation—no binding force.[16] However, under Article 39 the Security

[15] At the 127th meeting of the Security Council, the Australian delegate interpreted a recommendation made by the Council under Art. 36, as binding upon the parties by reference to Art. 25, according to which the members have to accept and carry out the decisions of the Security Council. (Security Council, *Official Records*, 2nd year, No. 34, pp. 723, 726.)

[16] At the 159th meeting of the Security Council, during the discussion of the Greek case, the delegate of Yugoslavia asserted that under Chapter VI, including Art. 34, the Security Council could only make recommendations, not decisions, binding upon the parties, and that, consequently, investigations on the spot could be made only with the consent of the State concerned. The delegates of the United States, Brazil, Belgium and Australia rejected this interpretation, which, according to their opinion, would nullify Art. 34. (Doc. S/P.V. 166; cf. *International Organisation*, published by World Peace Foundation, Vol. 1, No. 3, September, 1947, pp. 502 f.)

Council may consider non-compliance with its recommendation a threat to the peace and resort to enforcement action against the recalcitrant State. If such enforcement action is interpreted to be a sanction, a recommendation of the Security Council may constitute the obligation to comply with the recommendation, that is to say, the so-called 'recommendation' may have the same character as a 'decision' of the Security Council, binding upon the members under Article 25. This is of great importance in case of a recommendation of terms of settlement. As pointed out, since such a recommendation may not conform with positive law and thus imply an infringement upon the rights of one or the other party, the Security Council having the power to enforce its recommendations, may create new law in the relation between the contesting parties; a power which is not conferred upon the principal judicial organ of the United Nations, the International Court of Justice.

It may be doubted only whether non-compliance with a recommendation made under Article 38 can be considered by the Security Council to be a threat to the peace, if this recommendation refers to disputes the continuance of which is not deemed by the Security Council to be likely to endanger the maintenance of international peace and security. If non-compliance with a recommendation made under Article 36, paragraph 1, by which the Security Council calls upon the parties to accept a definite procedure or method for the settlement of their dispute, may be considered, under Article 39, by the Security Council as a threat to the peace, the parties may be supposed to be obliged to accept this procedure. If the Security Council recommends submission of the dispute to the International Court, its so-called recommendation has, in view of the possible application of Article 39, almost the same effect as an act by which the Security Council itself would refer the dispute to the court.

WESTERN EUROPEAN FEDERATION

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From one point of view, the most striking thing about European federation is that it has not yet happened. The peoples of Western Europe inherit a common culture, derived from Greece and Rome, to which has been added a number of additional characteristics due to the triumph of Christianity over paganism in the time of Constantine the Great. For several centuries, during the Middle Ages, the conception of Christendom was a very real thing, influencing the attitude of all thinkers to political problems. The Church, in the Middle Ages, inherited the universalism of the Roman Empire. 'Throughout the Middle Ages', says Mr. R. O'Sullivan,[1] 'man shared a common concept of the universe. The mind of man was dominated by the idea of unity. Everywhere the One came before the Many. In the social order this concept culminated in the idea of a community which God had constituted and which comprised all mankind. In all the centuries of the Middle Ages, Christendom, which is in destiny identical with mankind, is set before us as a single universal community founded and governed by the Eternal Law of God and by the Natural Law which is the reflection of the conception of the Eternal Law in created things. Mankind is thus in the mediæval conception one body, a single folk. It is an all-embracing corporation which constitutes that universal realm, spiritual and temporal, which may be called the universal Church (*ecclesia universalis*) or, with equal propriety, the commonwealth of the human race (*res publica generis humani*).'

This conception of Western European organisation perished in the sixteenth century. It foundered on the rocks of religious separatism and State-sovereignty, which Jean Bodin erected into a formal doctrine at the end of the sixteenth century. Henceforward, State-sovereignty was the starting point of all discussions upon political theory and international law. Whatever conflicted with the wills of these man-made Leviathans must in the last resort fail. So international law was no more than a collection of usages embodying the normal practice of States in the relations with one another, but lacking compulsive force. Nevertheless, the conception

[1] 'Internationalism' in *European History*, Vol. 5, p. 1270.

of the unity of Europe never died, and successive political philosophers and statesmen put forward their plans for a European Commonwealth. The list of these plans given by Oppenheim-Lauterpacht [2] is lengthy but by no means exhaustive. When a European federation has at last struggled into existence, the names of their authors will deserve some permanent memorial. Indeed, the elaboration of an ideal federal constitution for the European nations, for the purpose of abolishing war, has attracted the best minds of the last four centuries. The enterprise has not failed for want of advocacy from some of the greatest minds which modern European civilisation has produced. Nor are the successive failures of attempts to turn their aspirations into political realities attributable to faulty draftsmanship. Analysis of the international relations of sovereign States leads to the inescapable conclusion that so long as each is a law to itself, so long will war continue, for when it is presented with what it regards as a threat to its vital interests, it must either resist with all the means at its disposal, or else submit, and in consequence of submission, descend to a position of inferiority in relation to its adversary. So the right to wage war in defence of vital interests has become the cornerstone of the political relations of modern States. It has acquired a new and more terrible significance in consequence of the failure of the League of Nations and the Second World War.

In the second half of the nineteenth century it was assumed by political scientists that if the five great Powers of Europe would federate, an era of peace of unlimited duration would open. But the great Powers of Europe did not federate. Instead, they fought two disastrous world wars, and today the world contains only two great Powers, each of continental size, and neither of them situated in Western Europe. Today, therefore, the problem of Western European Federation is not primarily a problem of ensuring world peace, but rather a problem of the survival of the Western European nations in which, almost overnight, they appear to have become small and insecure. In this respect, the problem facing Western Europe has certain features in common with the problem facing some existing federations at the time of the first association of their constituent parts.

In discussing the development and function of federalism, it is first necessary to distinguish various terms which are used in describing composite States. Amongst the various terms used are (1) Personal Union; (2) Real Union; (3) League; (4) Confederation; (5) Federal Union; (6) Unitary State. Definitions of these various

[2] *International Law.* Vol. 1, *Peace* (6th ed.), pp. 78–79.

terms are not always in accord, and in particular, frequent confusion arises in the differentiation of federations from confederations.

(1) A personal union exists when two or more sovereign, independent States are associated by the factor that they possess a common ruler. In all other respects, however, the identities of the two States remain distinct. In particular, each continues to pursue its own foreign policy. Such a personal union existed, for example, between Holland and England in the reign of William III, and again between Great Britain and Hanover between 1714 and 1837. A personal union also existed between Austria and Hungary before 1723.

(2) A real union exists where two or more States, formerly independent, possess a common ruler. Each continues to preserve its own identity, laws and institutions, but they appear as a single State in their external relations. Such a real union existed between England and Scotland between 1603 and 1707; between Austria and Hungary from 1867 to 1918; and between Norway and Sweden from 1815 until their separation in 1905. From this point of view the evolution of the British Commonwealth presents an interesting study. The Dominions have gradually proceeded from 'dominion status' to substantial independence, which has involved the development by each Dominion of a distinct personality in international law. From 1918 onwards, therefore, there has been a gradual transition from a real to a personal union between the United Kingdom and the Dominions.

(3) A league is an association of independent States. It arises from treaties concluded between them, and it differs from an alliance mainly in the circumstance that a league has a semi-permanent existence, whereas an alliance normally contemplates the mutual protection of members against some specific external threat. A league may develop certain rudimentary governmental organs, and when it does so it is on the way towards becoming a confederation. The United Nations Organisation and the League of Nations are extremely interesting studies from this point of view. The United Nations Organisation is simply a league of sovereign States; the League of Nations had some of the characteristics of a confederation, at any rate as described in the Covenant. In both cases practice has loosened the formal bonds between the members.

(4) A confederation (*Staatenbund*) is an association of sovereign States which possesses the appearance of permanence, and in which common governmental organs have been established. The object of a confederation is to establish a common set of institutions for common external action, but to leave the internal sovereignty of the

member States otherwise unimpaired. Thus, the central government has no direct contact with the citizens of the member States. Its commands reach them only through the instrumentality of the governments of the member States. Two well-known examples of confederations were the American Confederation which lasted from 1777 until 1787, and the German Confederation which was established in 1815, and which finally came to an end on the establishment of the German Empire in 1871. There are, however, many other examples of this type of association, but the lesson of history is that they are impermanent. Either the member States eventually resume complete liberty of action, and the association dissolves, or the confederation is replaced by a full federal union (as happened both in America and Germany).

(5) In a federal union (*Bundesstaat*) there has been a definite division of sovereign powers between the central and State governments. The powers of each are defined by a constitution, which cannot be changed by ordinary legislation or by the agreement of the separate State, but only by some special constitutional process. Thus, in a federation, the central government exercises direct governmental control over the citizens of the federation, though within a sphere defined by the constitution. The central government cannot trespass on the sphere of governmental activity of the member States, nor can the member States encroach upon the sphere of governmental activity of the central government. Accordingly, in federations it is usual for a supreme judiciary to be established, with power to hold legislation, whether federal or States, invalid as beyond the competence of the law-making body. The supreme judiciary in such a case holds the balance between federal and States powers, and it will be obvious that in an age such as the present, when governmental interference with the citizen is constantly extending, the judiciary has the power to determine whether, by ascribing the new spheres of activity to the central government, to extend the powers of the federation, or by ascribing these powers to the State governments, to extend their powers. Federations of great areas have been successfully established in the United States, Canada and Australia, in Mexico and Brazil, in the Soviet Union, and now in India and Pakistan. These are only a few of the many examples of successful federations. Indeed, federation appears to have solved many of the difficult problems arising from the desire to reconcile location with the security which today can only exist in the larger power units, with considerable area and great resources. Moreover, it is a striking fact that in every case where a federation has been successfully launched, it has been responsible in a remarkably short space of time for the

development of a sentiment of common nationality, transcending but not replacing the local patriotisms which already existed.

(6) In a unitary State supreme power rests in the central government, which has power to create, modify or abolish subordinate governmental agencies at will. Such a power may be accompanied also with the power to change the constitution by ordinary legislation, as in Great Britain, or alternatively, changes of the constitution can only be achieved by some special constitutional process, as in France. Naturally, in the complex conditions of the twentieth century there is often a considerable amount of devolution of governmental power in a unitary State, and sometimes the existence of a unitary State may be concealed by a written constitution in which certain local governmental agencies are described. This is the position in the Union of South Africa, where the constitution is nominally federal, but in reality South Africa is today a unitary State whose central government is supreme. The same situation also exists in some of the Republics of South America.

It is necessary also, in discussing federalism, to say something of the functions fulfilled by it. A federal constitution is usually adopted where a number of units of roughly equal status wish to establish a permanent closer association. This is the position, for example, in the United States, Australia and Canada. Sometimes this equality of status is reflected in the composition of the Second Chamber, where all the constituent States are equally represented. Such equality of representation exists in the Second Chambers of Australia and the United States, even though the disparity in population and development between New York and Pennsylvania, on the one hand, and Oklahoma and Nebraska on the other, is great. In Canada, however, there is no such equality of representation between the provinces. This disparity exists for historical reasons, and it has the effect of protecting the French-Canadians of Quebec from the domination of the English-speaking parts of the Dominion. Federation, however, may be an instrument for the disguised domination of the other States by one which very greatly exceeds the others in population, resources and power. This was the position of Prussia in the Federal German Empire which existed from 1871 until 1918. It is also the position of the Russian Soviet Republic in the Soviet Union; although here another factor must be considered, for the real power of the Soviet Union is concentrated in the highly-centralised Communist Party, which operates through the formal constitutional machinery both of the Soviet Union and of the constituent republics. Dr. Schlesinger has described the position as follows :

' The U.S.S.R. was founded, by agreement on general principles,

on December 30, 1922. But the new constitution did not come into force until July, 1924, after much discussion. Important, from our point of view, is the fact that here the principle of division of powers, rejected by Soviet ideology in its usual applications, was introduced for a certain limited purpose; protecting the autonomy of the smaller national republics which had been granted to them by the constitutional compromise from interference. To secure this in the federal constitution a two-chamber system was established, with the second chamber composed of a majority of non-Russians. Of course, under the one-party system it was most unlikely that the second chamber would in fact exercise its powers of obstructing legislation deemed harmful to the rights of the national republics. It functions as a body where the complaints of these republics and matters especially touching their interests were discussed. The actual decisions, as all important decisions in Soviet life, are taken within the Party caucus. But the purpose of the system is to bring different influences to bear upon that caucus, and to suggest compromise in certain fields where the mere working of compulsion, otherwise a normal part of proletarian dictatorship, is regarded as undesirable. These fields are mainly cultural (although they include, for example, the application of general principles of Soviet Law to local circumstances).'[3]

The present Soviet Constitution, introduced in 1936, has not changed the function of the second Chamber, or modified the control exercised by the Communist Party.

Experiments in federalism in Europe have been many, and amongst them, the Hanseatic League, the Swiss Confederation, and the Dutch Federation deserve notice, for in each federal development followed a course distinct from that of the others. In the great days of its commercial power, the Hanseatic League was an association of European dimensions, organised for the promotion of the commercial welfare of the constituent cities, with an effective defence organisation and a central Diet, the *Bundestag* or *Hansetag*. In the days of its greatness the Hanseatic League was capable of waging war successfully against some of the principal maritime powers of Europe. The causes of its decline were inherent in its character. It was a monopolist trading structure, which was compelled to yield to the rising tide of national commerce which accompanied the birth of the nation States of Northern Europe. Moreover, Lübeck occupied a dominating position in the affairs of the League, and as the other Hanse towns grew in size and importance, jealousy of Lübeck increased rapidly. Because of its character, the

[3] *Soviet Legal Theory*, pp. 119–120.

League could not grow into a close-knit federation; and it perished eventually from internal disunity, facilitated by its confederate structure coupled with external pressure from neighbouring national States. The Hanseatic League was merely the greatest and longest-lived of the leagues of mediæval cities, of which another important example was the Rhenish Confederation, created in 1254 for the defence of the towns in the Rhine valley.

The Swiss Confederation has the longest history of all European federations, and it has often been emphasised that it has triumphed over diversity of races, languages, and religions, and even over geographical obstacles to closer association. The beginnings of the modern Swiss State are to be found in the successful resistance in the thirteenth century of three cantons, Schwyz, Uri and Untenwalden, to the encroachments of their overlord, the Count of Hapsburg. When that struggle had been won, the three cantons concluded, on August 1, 1291, a perpetual league for mutual protection. The necessity for this was demonstrated when Leopold of Austria renewed the attack on Swiss freedom at the beginning of the fourteenth century. Once again Austria was unsuccessful, and in 1315 the league was renewed. In 1339 it was strengthened by the entry of Lucerne. Before the end of the century Bern, Zurich, Glarus and Lug had joined the league which, by the Covenant of Sempach in 1393, adopted a confederate constitution for the purpose of assuring its permanence. The Swiss Confederation, however, did not escape the fate of confederations, and during the fifteenth century it was on more than one occasion in danger of disruption in consequence of internal dissensions. From this it was saved by the attacks of Charles the Bold, and when the struggle with Burgundy at last ended in a further vindication of Swiss independence, it was found possible, in the Covenant of Stans in 1481, to strengthen the powers of the central government. Between this date and 1513, moreover, Basle, Schaffhausen and Appenzell were admitted to the *Bund*, which remained, however, a confederacy of distinct communities, which acted in common only on threats from outside. Moreover, there remained within the separate cantons the greatest variations in political structure, from the completest form of liberty in the Forest Cantons to an oligarchy based on privilege in some of the towns. Accordingly, in the less democratic cantons the French invasion of 1798 was accepted as an excuse for revolt, and there was substantial support for the establishment of a French-inspired federal constitution. When the French withdrew in 1802, however, civil war ensued between those who wished to return to the old confederate constitution and those who wished to retain the federal constitution introduced by the

French. Accordingly, the French re-entered Switzerland in 1803, and the federal constitution remained until the collapse of French power in 1813. At the Congress of Vienna, in 1815, Switzerland agreed to accept a constitution which was a compromise between the old and the newer constitutions, in exchange for a guarantee of neutrality. However, one important provision of the constitution of 1815 removed all internal customs barriers, and another abolished the archaic privileges which had disappeared under the French constitution. On the other hand, cantonal separatism prevented the establishment of a federal executive, and insisted upon the necessity for unanimity in divisions of the Diet—a decisive indication of the confederate character of the constitution of 1815. The result was a period of disunity in which rival leagues of cantons formed within the Confederation, and between them civil war broke out on numerous occasions. The struggle came to a head in 1847, when the secessionist activities of a number of cantons were completely defeated, so that in 1848 the final decision was taken to establish a genuine federation which, with some modifications introduced in 1874, still endures. During the century of federal union there has been a striking growth in the sentiment of Swiss nationality, combined with a firm adherence to a democratic way of life, which has survived all the onslaughts of the past three decades. Nevertheless, in Switzerland, federalism was only achieved after five and a half centuries of common association, during which local animosities and separatism slowly diminished in intensity.

The history of Dutch federalism has had a different conclusion. During the fourteenth and fifteenth centuries, when the territories which now form the Kingdom of the Netherlands were part of the dominions of the Dukes of Burgundy, they gradually acquired the habit of acting in association, first in financial matters, and later, on common governmental questions, their assent being given in the States-General of the representatives of the various provinces. When in the sixteenth century the overlords became Kings of Spain, the provinces of the Netherlands gradually stiffened in their resistance to Spanish exactions, and ultimately broke into revolt, which culminated in their independence. Nevertheless, until the Act of Federation, concluded at Delft in 1576, the two provinces of Holland and Zealand, were really no more than leagues of municipalities each of which jealously preserved its independence and privileges. The Act of Federation, however, not only created a genuine federation in place of the loose association of States which had preceded it, but it also created a strong executive, the head of which was the Stadtholder. This was an inescapable consequence

of the dangers of Holland's position. Although the Act of Federation was supplemented by the Pacification of Ghent, envisaging the States-General as the assembly of the representatives of the citizens of the constituent units, which were declared to include all the territories of Holland, Zealand, and Flanders, religious and economic differences eventually separated the northern from the southern provinces, thus leaving the northern provinces to achieve their independence alone. The achievement of that independence proved long and difficult, and when it was finally secured by the Peace of Westphalia in 1648, the habit of common action had become so firmly established that a full federal union was the only practical expression of it. This fully federal organisation survived until 1795, when it was destroyed by French occupation. When Holland again became independent, in 1815, the sense of nationality had grown so strong that it was found possible to introduce a unitary constitution, at the head of which was the House of Orange. Thus the history of the Kingdom of the Netherlands illustrates the full transition from permanent league to unitary State—a transition in which the dominating theme has been the determination to preserve a hard-won liberty, leading steadily towards increasing centralisation of government.

The story of the establishment of the present federal constitution of the United States has often been told. Indeed, it forms the most powerful argument of the propagandists for federal union, whether in Europe or the world. Moreover, the discussions conducted by Hamilton and others in successive issues of *The Federalist*, which had decisive influence upon the deliberations at Philadelphia in 1789, are part of the classic literature of federalism. From these arguments, and from the subsequent history of the United States, the federal propagandists have constructed the dangerous argument that, if only nations would consent to adopt a federal constitution, the evils of war would be abolished. We should, in fact, have achieved 'the parliament of man, the federation of the world'. Words in themselves, however, change nothing. They gain potency only when supported by overwhelming power which, in the last resort, must rest upon the determination of men to perpetuate and give effect to the institutions which they create. From the long and glorious history of the United States as an illustration of the successful operation of the federal principle in action, it is only possible to select a few significant factors. These, however, will help us to understand the reasons for the success of the American experiment:

(1) At the time of their separation from Great Britain, the thirteen colonies had already enjoyed nearly a century and a half

of common action in matters of local interest, and a federation of the American colonies had been frequently advocated by American writers, and notably by Benjamin Franklin, before the independence issue was ever raised.

(2) The inhabitants of the thirteen colonies sprang from a homogeneous racial stock. They spoke a common language, and they possessed a common culture, and a common social, political and legal tradition.

(3) The transition from the Articles of Confederation to a federal constitution was prompted mainly by the fear of the States of losing their independence, the primary enemy being regarded as Great Britain, but there was a secondary fear of other European powers, notably France and Spain.

(4) Although it is common form to speak today of the Constitution of the United States as an outstanding example of a federal constitution, and although Hamilton argued in favour of a fully-federal constitution, it was not so clear in 1787 that this was what had been done at Philadelphia. The issue of States' rights, 'sovereignty', and the right of secession was deliberately left unsettled, and it was possible for both secessionists and federalists to argue from the articles of the constitution in support of their case. Further, the Southern States had not always been the advocates of States' rights and the Northern States of federal powers. During the war between Great Britain and the United States in 1812–14, when northern manufactures and commerce suffered severely from the activities of the British navy, the States of New England had threatened to secede, and a union of them with Canada had been discussed. Groups of States, therefore, used the argument of States' rights and the threat of secession as a weapon of the minority against a dominant majority, but compromise was always possible, albeit on an increasingly precarious footing, until Lincoln decided to settle the question for ever by uniting the federalist cause with that of the total abolitionists. The tenacity with which the Civil War was fought indicates that if it had been fought twenty years earlier, the Confederates would have won. The intervening twenty years gave the north just sufficient industrial strength, and the sentiment of American nationality, which was the main support of the federalist cause, had grown sufficiently in the same period to decide the struggle in favour of the maintenance of the Union. Nevertheless, the American Civil War should be an abiding warning to those who suggest that political problems of the first magnitude can be solved by exhibitions of the draftsman's skill.

(5) The development of the United States, as we know it today,

is, however, the direct consequence of the triumph of federalism. Only a federal constitution could have provided the constitutional framework for the spectacular march of the United States across the continent in the nineteenth century; and only a federal constitution could have given investors the necessary assurance of stability to permit the growth of transcontinental railroads, opening out the Middle West. In the twentieth century, two further developments have occurred. The international chaos which has been evidenced by two world-wars, with their slowly perceived threats to American security, have accelerated America's industrial development and the organisation of her vast resources, at the same time creating and intensifying American nationalism; whilst changing views of the function of the State organs in respect of the community have been responsible for the increasing organisation of individual lives by State-regulation, and the greater part of this new activity has been discharged, and is being discharged by federal agencies. Accordingly, although the American Supreme Court has consistently upheld State-rights, it has also been compelled to recognise that federal powers have grown, and must continue to grow in twentieth century conditions. Consequently the United States is a stronger and closer federation today than she was half a century ago, and it seems probable that in 1998 she will be a much stronger federation still. Today, a separate foreign policy for Utah or Florida is unthinkable. Further stresses and strains, especially during a third world war, might lead to constitutional amendments giving the federal executive, if not the federal legislature, further powers than those at present enjoyed. In Canada and Australia, though the problems encountered have been of lesser magnitude, a similar development has taken place.

All these federal experiments have some important lessons for those who study the problem of closer association of the European Powers today. The first, and most obvious, seems to be that co-operation alone is not enough. Consultations and reciprocity break down in times of stress, and the testing-times for federalism, as for all political institutions, are the times of difficulty and external pressure. To recall Professor Toynbee's interpretation of European history, the mid-twentieth century presents Europe with a momentous challenge, to which, if it is to survive, it can only make one response. Modern history is strewn with the wreckage of leagues and confederations which failed to make an adequate response to the needs of the day. They have failed, not for want of a federal constitution, but because local jealousies prevailed over a sense of common purpose. Today, Western Europe, as we know it, will perish, unless the sense of common purpose and common

security prevails over our local separatisms. The question which Western Europe must answer today is whether it feels that the common interest and culture amongst its members is as strong as that which existed among the Swiss cantons in 1848 or among the American States in 1787. If it is, then the peoples of the separate Western European States will welcome federalism as a means of achieving a fuller life than that which exists today, and not regard it as an obstacle to the achievement of separate national aspirations which are, in any event, anachronisms in the Atomic Age. In fact, the cultural unity of Western Europe has always been strong since Roman times.[4] It has given to the world a common conception of law, government, and society. Its religion and philosophy transcends internal frontiers, and the organisation of international society itself is a direct product of the compromise between the conflicting interests of national states which was established in the first half of the seventeenth century. On the other hand, no useful purpose is served by minimising differences in outlook, which are the product of many centuries of distinct development, and which reflect the national genius of each of the separate States. If they are today to be confined within a federal system, it is because the upheavals of the twentieth century have created gigantic world-powers, beside which the States of Western Europe are of lesser stature; because the economic changes of the twentieth century have emphasised the interdependence of all States, and in particular the interdependence of the States of Western Europe; because they are faced with the perplexing problem of Germany, the solution of which can best be sought within a federal framework; and finally, because in the world-wide conflict of interests between the Soviet Union and the United States, the States of Western Europe must either seek their own security collectively, or else become a gigantic No-man's-land between the two Leviathans of the present time.

It is submitted, therefore, that no closer association of Western Europe can be regarded as adequate which fails to provide the necessary machinery for the achievement of political security and economic stability. A detailed analysis of these two essential functions, however, would show that today they would involve the concession of wide powers to a central authority. Security, for example, cannot be achieved by co-ordinated defence arrangements between sovereign States alone. It must also involve a single foreign policy, closer integrated than the foreign policies of the British dominions. Otherwise, there is the possibility that differing interpretations of the effect of international obligations will wreck a

[4] This point is developed further by the present writer in ' The Future of British Foreign Policy ', 2 *Year Book of World Affairs*, pp. 1–26.

European federation as certainly as they wrecked the League of Nations. Moreover, the relation of the defence services to one another must be planned as a whole. So must the location of arms industries, or airfields, and the improvement of means of defence and communication. All these activities involve the raising and spending of money and the history of past confederations and federations shows that the taxing power is, in reality, the key to the solution of the problem whether the federal authority is to possess real power. If the separate States retain the right to fix and raise their own defence contributions, then it follows that, in the last resort, they retain control over their freedom of action in times of emergency, and the closer association is confederate in character. If they concede the taxing power for defence, then the federal nature of the association follows logically. It may be argued that this delimitation of function involves some difficult questions of draftsmanship. This is, indeed, true; but problems as difficult—for example, the protection of the distinctive culture of French-Canadians in Canada—have already been faced and solved.

In the last resort, the questions of defence and foreign policy are the centre of the entire problem. Other questions undoubtedly present many difficulties, but the experience of the great federations show that they are not vital to the continued existence of the federation. For example, Professor Dawson, in his recently published volume on *The Government of Canada*, has shown that the twentieth century has presented Canada with awkward economic problems, which, under the Constitution, neither the Dominion Government nor the Provincial Governments could face in isolation. Conferences between Dominion and provincial representatives have therefore been held, and agreements reached, providing for joint arrangements, within the powers assigned by the Constitution to the Dominion and the provinces. In Australia, there has been a somewhat similar development, which first took shape during the economic depression of the nineteen-thirties. In some ways, the experience of Canada under federation is more illuminating, from the standpoint of Western European federation, than that of the United States, because the disparity between the federating units has been greater; because there has been the problem of the two races, each with its distinct racial characteristics, and finally, because the adoption of federation was such a necessary prelude to achievement of security *vis-a-vis* a powerful neighbour (with which Canada has since lived in amity) and to the development of the great resources of the Dominion.

The particular problems of federation are many and important,

and cannot be discussed shortly. For example, some common federal citizenship would have to be created. For British subjects, where the duality of Dominion citizenship and British nationality already exists, this is an intricate matter. Again, the acceptance of federation by Great Britain would involve (1) the abandonment of the doctrine of the absolute sovereignty of Parliament, and (2) the adoption at any rate of a partially written constitution by Great Britain. Both these are formal changes rather than changes of substance today; for the sovereignty of Great Britain, as of all other States, is already limited (especially in the economic sphere) by an increasing number of international agreements, whilst in fact, an increasing amount of British constitutional law is necessarily embodied in statutes. In any event the redefinition of the terms of our political association is already considerably overdue. There is also the problem of a Supreme Court for the federation, although this would be regarded as an automatic development by lawyers, and the precedents are many and valuable. One other question of importance is the relation of the remaining colonies of the Western European powers to the federation, but here some of the difficulties have already diminished in consequence of the establishment of conferences and boards of consultation between colonial administrators. A matter of greater complexity would be the relation of the federation to the British Dominions, to the United States of Indonesia, or to the Indo-Chinese Federation. The complexities here, are not complexities of law, for it would be a simple matter to regard the federation as the universal successor to the rights of the component States. The complexities arise rather from national sentiment, from the economic relations of these extra-European States with their European associates, and from their own conceptions of their security needs. These problems, however, exist in any event, and whilst federation introduces a fresh element of difficulty, this can be set off by the fact that a federation of Western Europe in itself offers a means whereby Western Europe can once again become a self-reliant organism, capable of taking its place in world affairs by the side of the United States of America and the U.S.S.R.

EDITORIAL NOTES

HUMAN RIGHTS

An interesting discussion on 'Human Rights' took place at the meeting of the Grotius Society on February 4, 1948, under the chairmanship of Sir Cecil Hurst, President of the Society.[1]

The discussion was opened by Mr. W. E. Beckett, C.M.G., K.C., who made it clear at the beginning that he was merely laying information before the meeting for this purpose and wished to refer to two important documents: (1) The Foreign Office Draft on Human Rights, and (2) the Draft Declaration and the draft text of the International Covenant on Human Rights which were drawn up at the last session of the Commission on Human Rights of the United Nations.

Mr. Beckett then continued: 'The first document may be held to express the official British view on the question of Human Rights, but I want to make it clear that, apart from the views contained in them, what I am going to say now is my own opinion and should not be taken as an expression of official policy.

'I wish to take two texts on which to base my remarks: The first is, that I think in the last analysis Human Rights and Freedoms are one of the few things for which the people of this country would fight and for which it is worth fighting. The second is contained in a paper presented by Judge Charles de Visscher to the Institute of International Law last August in which he stated that " respect for human personality is a great restraining influence on the executive and prevents the executive at home developing into tyranny, and abroad into a machine of destruction ". The Fascist or Nazi State may be defined as a State which would not recognise human rights.

'The Charter of the United Nations, however, refers to Human Rights in about six places, and refers to them as rights and freedoms regardless of colour, sex, race, religion or nationality. But the Charter does not define human rights, and the United Nations have set up a Committee to explore the fundamental rights and freedoms recognised by States. Three other Committees or sub-Committees have been set up, however—one to examine the

[1] The full discussion will be printed in Vol. 34 of the *Transactions of the Grotius Society*.

question of minorities, the second to consider the freedom of the press, and the third to report on the status of women—and it has been questioned whether it was wise to set up at the same time these four Committees covering such a wide field of inquiry. There is, perhaps, a justification for the Committee on the status of women, because its activities go beyond the scope of the fundamental freedoms, but the Committee on Minorities and the Human Rights Committee may be apt to get into each other's way. Moreover, the setting up of four bodies simultaneously imposes a great strain on countries regarding representation.

'The Human Rights Committee uses the awful word "implementation", the meaning of which involves both "execution" and "enforcement". Execution means that States must take all steps necessary—by legislation or otherwise—to ensure that human rights are protected in their territory as required by their international obligations. Enforcement means the action to be taken against States to investigate allegations of violations and prevent the violation of human rights in those States.

'The Human Rights Committee adopted a text called a Declaration and a text called a Covenant. Both are included in the International Bill of Rights. The Declaration is really a statement of ideals—all men are born free, endowed with freedom of conscience, everyone has the right to liberty of person, social security and so on. It may be said in favour of the Declaration that declarations such as the United States Declaration of Independence and the French Declaration after the Revolution have acted as beacon lights. Moreover, States might agree on aims so simply stated, while they would not accept more involved statements. Thus, States so fundamentally opposed in all their ideas as the United States and the U.S.S.R. may agree on such simple statements of ideals.

'Since the Declaration is confined to statements of ideals, there would be no question of enforcement. This is important, because the U.S.S.R. for one would strongly object to enforcement. But there is a danger in the very simplicity of the Declaration. States will accept the simple statements but they may not mean the same thing to different States—we all know that the United States and the U.S.S.R. have widely different views as to the meanings of "democracy" and "freedom of the press", though they both profess devotion to these ideals. Procedure by Declaration, therefore, means the adoption of statements which might be interpreted completely differently by different countries. Nevertheless, the United States favour the Declaration because they fear that the

more detailed, legally expressed and legally binding instrument would be difficult to get accepted by Congress, in view of their Constitution.

'The United Kingdom, on the other hand, do not consider that the Declaration will bring great progress. In fact, they think that it would merely be a battleground for different views of the terms contained in the Declaration. The United Kingdom realised that ideals like the right to work, social security and so on, could not be included in a legally binding instrument, but thought that these could be dealt with by the specialised agencies and special conventions. The United Kingdom official philosophy is indicated in the draft resolution in Appendix 2 of the Geneva Draft—in other words, if there was a binding Covenant, we would be prepared to agree to the Declaration as well. The Declaration obviously could not create a legal obligation but the Covenant would.

'There are difficulties about the Covenant, however, in particular with regard to enforcement. We had to consider the most that States would be likely to accept in the way of control. The United Nations is not a calm judicial body. Emotions run high, and, though there is always a middle group who do go on the merits of the argument, a large number of votes may be predicted on purely political grounds. This leads me to suggest that the more far-reaching provisions for enforcement suggested do not take into account the realities of international life.

'The objects of the Geneva meetings were to adopt a Declaration of ideals and to find a covenant which would be legally binding. These proposals are not final, however, and some of the texts submitted show provisions in the Declaration which ought to be in the Covenant, and provisions in the Covenant which ought to be in the Declaration, while other texts, though interesting are perhaps not very practical. They represent first tentative efforts'.

THE LAUSANNE SESSION OF THE INSTITUTE OF INTERNATIONAL LAW

In his editorial note in Vol. 1 (No. 4) of *The International Law Quarterly*, Sir Cecil Hurst wrote that 'if any reader of this "Quarterly" would make a good English text of the Declaration [on the Fundamental Rights of Man] and send it to the editors of the "Quarterly" it would be very helpful

The editors are grateful to the reader from whom they have now received the following English translation of the French text of the Institute's Declaration:

Fundamental Rights of Man, as the Basis of a Restoration of International Law

(Declaration adopted by the Institute of International Law at a Session held at Lausanne on August 9, 1947.)

The Institute of International Law,

Being of opinion that on the morrow of the recent events which have rocked the very foundations of a civilisation traditionally based on respect for human values, it is of the utmost importance to re-affirm certain principles which correspond especially to the present demands of the juridical conscience of all civilised peoples.

Observing that the political regimes which have subjected and degraded the individual have sought through this total subordination of man to their political ends the means of embarking upon campaigns of aggression and conquest the like of which must be for ever banished.

Recalling that the Member States of the United Nations have undertaken as their avowed object the achieving of 'international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms' (Charter of the United Nations, Art. 1, para. 3; cf. Article 55c).

Declares:

I

Recognition of and respect for the rights inherent in the human being, whom the State must serve and not subject, are closely bound up with the development of international law.

II

Such recognition and respect are fundamental to any functional conception of Power. Power derives its title from its ability to secure the full realisation of the individual and social role of the human being.

The spreading of this fundamental idea in the minds of men will act as a moderating influence on Power and will confine the State to its proper role by preserving it from the tendency of those entrusted with Power to abuse the same.

III

An effective juridical order prevailing between States is inseparable from respect for the individual human being in the domestic order of each State.

In the international domain, the functional and moderating

conception of Power remains obscured by the strength of the tradition that sees in the sovereign State, an organism of security and instrument of influence, the highest form of juridical order.

IV

To advocate respect for human rights without ensuring its enforcement by effective measures of guarantee and control is inadequate both in the international and the national domain.

V

The Institute regards the acceptance and spreading of the ideas set out in the present Declaration as an essential condition for the observance of international law and its technical development.

THE INTERNATIONAL SHIPPING ORGANISATION [1]

An Inter-Governmental Maritime Consultative Organisation has been set up, subject to ratification, by the United Nations Maritime Conference working in Geneva from February 19 till March 6, 1948.

The new Organisation, which will be of a consultative and advisory nature, will have its headquarters in London, and will be a Specialised Agency of the United Nations, on the same basis as the Food and Agriculture Organisation and the World Health Organisation. It provides a missing link in the chain of United Nations agencies in the field of transport.

The purpose of the Organisation is to (actual text of Convention):—

(*a*) provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation;

(*b*) encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute

[1] The text of the Final Act of the Conference with Annexes and Conventions establishing this Organisation will be found amongst the Selected Official Documents, *infra*, p. 345.

discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;

(*c*) provide for the consideration by the Organisation of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II (Functions);

(*d*) provide for the consideration by the Organisation of any matters concerning shipping that may be referred to it by any organ or Specialised Agency of the United Nations;

(*e*) provide for the exchange of information among Governments on matters under consideration by the Organisation.

The setting up of an International Maritime Organisation was first recommended by the Transport and Communications Commission and the Economic and Social Council.

The Council sought the opinion of the United Nations Maritime Consultative Council which, at its final session before winding up, on October 30, 1946, recommended to its members that a permanent Organisation be set up. The present Maritime Conference was therefore called to consider the matter and the following Organisations were also represented by Observers:

Inter-Governmental Organisations:
International Labour Office.
World Health Organisation.
International Civil Aviation Organisation.
International Telecommunications Union.
International Meteorological Organisation.

Non-Governmental Organisations:
International Co-operative Alliance.
International Chambers of Commerce.
International Law Association.
International Transport Workers Federation.

The Convention which, in a sense, represents the Charter of the new Organisation, was finally voted upon the last day of the meeting. Twenty-one countries accepted the complete text, one rejected it, and seven countries abstained. Eighteen delegates signed the Convention then and there.

This Convention, which is open to signature by other States, will enter into force on ratification by twenty-one States, of which seven shall each have a total tonnage of not less than 1,000,000 gross tons of shipping.

The Conference also adopted a resolution on the establishment

of a Preparatory Committee to make the preparatory arrangements to enable the first session of the Assembly of the Maritime Organisation to be convened and the Organisation established as soon as possible after the requisite number of ratifications has been obtained.

The following twelve countries were appointed to the Preparatory Committee: Argentina, Australia, Belgium, Canada, France, Greece, India, the Netherlands, Norway, Sweden, United Kingdom and United States of America. The Committee held its first meeting immediately on Saturday morning and decided that its next meeting should be held at Lake Success at the end of October.

The Conference also prepared a draft Agreement defining the relationship between the United Nations and the new Organisation. The majority of the countries represented were of the opinion that a permanent international organisation in the shipping field would be of great assistance, particularly in solving technical problems such as those concerning the safety of life at sea. In cases of this kind, the necessity arises for co-ordination with the organisations dealing with telecommunications, meteorology and also aviation. Moreover, in the shipping field, there are a large number of international conventions, and a central organisation is needed to take charge of these conventions.

While certain nations, the Scandinavian nations in particular, would have liked to limit the Maritime Organisation's scope to the technical field, the Conference went further in adding to this field the delicate question of discrimination practised both by Governments and by shipping concerns.

The Assembly is to consist of Delegations from all the Member Governments, and each is entitled to one vote. It will hold a regular session once every two years.

The composition of the Council of the Organisation gave rise to considerable discussion. The Conference was anxious to preserve a balance between countries providing international shipping services and countries using such services. The first group cannot risk having imposed on it by the second, for reasons such as the safety of life at sea, for instance, measures which would place an undue burden on shipping. The Council will, therefore, be composed of sixteen members, eight representing countries having an interest in providing international shipping services, and eight representing countries having an interest in international seaborne trade. The following countries, being the six principal maritime nations, are to sit on the first Council: Greece, the Netherlands, Norway, Sweden, United Kingdom and United States. The following countries, being the six principal shippers, are to sit on the first Council: Argentina, Australia, Belgium, Canada, France and India.

Two more countries amongst those substantially interested in providing international shipping services, and two among the countries substantially interested in international seaborne trade are to be elected to the Council by the Assembly.

Besides the Assembly and the Council, the Organisation will include a Maritime Safety Committee composed mainly of technicians, and working in close co-operation with other competent organisations, particularly those concerned with telecommunications, meteorological questions and aviation. The Organisation will have its own Secretariat.

The Final Act was signed by thirty-two of the thirty-six nations represented.

BASES LEASED TO U.S.A.—BERMUDA—MEANING OF 'TERRITORY OR POSSESSION'—DECISION IN U.S. CIRCUIT COURT OF APPEALS

By an exchange of Notes with the United States Government on September 2, 1940, His Majesty's Government in the United Kingdom undertook (i) to grant 'freely and without consideration' a lease to the United States of America of certain areas in Newfoundland and Bermuda 'for immediate establishment and use of Naval and Air bases and facilities for entrance thereto and the operation and protection thereof'; (ii) to make available similar Naval and Air bases and facilities in the Bahamas, Jamaica, St. Lucia, Trinidad, Antigua and British Guiana in exchange for naval and military equipment; in consideration therefor the United States Government undertook to transfer immediately to the United Kingdom fifty United States destroyers.

An Agreement was concluded between the two Governments on March 27, 1941, referred to below as the Bases Agreement, which defined the regime to be established in the Leased Areas and contained in its annexes the forms in which the particular leases were to be executed and other special provisions for individual territories.

During 1941, Vermilye-Brown Co., incorporated in the State of New York, were doing business as building contractors in the base area in Bermuda, leased to the United States of America under the Bases Agreement, and in the course of this business they employed a number of patrolmen and firemen. These employees, who were not locally engaged, brought an action in the District Court in New York against the company under the United States Fair Labor Standards Act, 1938, for additional overtime compensation; for liquidated damages on grounds which are not here material, and for attorney's fees: *Cornell* v. *Vermilye-Brown Co.*,

Inc. The District Court held that the leased area was not ' a territory or possession ' of the United States within the meaning of and scope of the Act, and gave judgment for the defendant company. The plaintiffs appealed.

The substantial question before the United States Circuit Court of Appeals sitting in New York was whether the United States exercised such control of the leased area in Bermuda as to make the Fair Labor Standards Act, 1938, being a Federal Act, applicable to the employment of persons there.

Circuit Judge Clark, giving the judgment of the court on November 28, 1947, said: ' The obligations defined by the Act are required of every employer for the benefit of each of his employees " who is engaged in commerce or in the production of goods for commerce ". " Commerce " is defined to mean " trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof "; while " State " means any State of the United States, or the District of Columbia, or any territory or possession of the United States '. Further, the Act ' would seem broadly enough phrased in its purpose to extend Federal control in this field throughout the farthest reaches of interstate commerce '.

He rejected the argument of the respondent company that the question, whether the leased area is or is not a territory or possession of the United States, is a political question to be settled by executive or legislative determination. ' It is difficult to see how this is such an issue; before us is a matter of interpretation of an Act in issue between two groups of private parties.'

He then proceeded to examine the Bases Agreement, in order to determine whether the regime established in the leased area permitted such control by the United States as to make it a ' territory or possession ' of the United States for the purposes of the Act.[1]

[1] He drew attention to the following parts of the Agreement:

Art. I (i) provides that ' the United States shall have all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control '. Art. IV lays down rules for the exercise of United States jurisdiction over offences and provides also for cases where the United States ' shall elect not to assume and exercise such jurisdiction '; Art. VIII deals with reciprocal surrender of offenders between the Leased Area and the territory in which it lies; Art. XI (4) reads, ' It is understood that a Leased Area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas '. Art. XIII suspends the operation of the immigration laws in the case of persons entering the territory, in which a Leased Area lies, who come in the forces of employ of or under contract with the United States Government ' in connection with the construction, maintenance, operation or defense of the bases in the territory ': Art. XVI authorises the United States ' to establish United States post offices in the Leased Areas for the exclusive use of the United States forces and civilian personnel ';

The court was of the opinion that 'The cumulative effect of these various provisions compels the conclusion that the areas are subject to fully as complete control by the United States as obtains in other areas known as "possessions" of the United States'; and the 'sweeping powers' conferred on the United States in the leased area distinguished this from similar cases, where the Act had been held not to apply.[2] Further, the court noted the absence of a decisive ruling on the status of the leased area in Bermuda by the United States Executive.[3] The court, therefore, having decided that the leased area in Bermuda had the character of a 'possession' of the United States for the purposes of the Fair Labor Standards Act, 1938, reversed the decision of the District Court and remanded the case for further proceedings.

It must be emphasised that the court did not say that the leased area in Bermuda was a 'possession' of the United States, and, indeed, it could not do so in face of express terms[4] of the Bases Agreement, which provide with considerable care and detail that the base areas are transferred to the United States of America under lease, a concept familiar in both municipal and international law. But it is submitted that the court went too far in declaring that the leased areas are 'subject to fully as complete control by the United States as obtains in other areas known as "possessions" of the United States'; since (i) the control is not in fact so complete in view of various limitations[5] on United States authority to which the court did not refer; and (ii) there was no need to go further than to say that the United States had sufficient control in the

Art. XVII exempts such persons from taxation 'except in respect of income derived from the territory'; under Art. XXI the United States 'may at any time abandon any Leased Area or any part thereof' upon not less than one year's notice and 'at the expiration of such notice the area abandoned shall revert to the lessor'; Art. XXIV entitled 'Possession' reads: 'On the signing of this Agreement, leases of the Leased Areas . . . shall be forthwith executed, and all rights, power, authority and control under such leases and under this Agreement (including transfer of possession where it shall not previously have been transferred) shall thereupon become effective immediately . . . .'

2 United States nationals employed at defence bases in Greenland, Canada and Brazil: in the first case the United States occupied a leased area, but the employment was held not to be 'commerce' within the meaning of the Act; in the other two cases there was no lease and the employees were considered by the court to be working in foreign countries, to which the Act, being limited to territories and possessions of the United States, could not apply.

3 The State Department, in a letter to the respondents, stated 'This Government has not made any claim that the bases in Bermuda are territories or possessions of the United States and there would therefore appear to be no reason for any ruling or opinion on the matter'.

4 Art. XI (4), cited above in footnote 1, despite its wording, raises no presumptions about the status of the Leased Area, since its only purpose is to meet certain requirements of United States law.

5 For example, by Art. XXV, all mineral rights are reserved to 'the governor and inhabitants of the territory'.

leased area to make it a 'possession' for the purposes of the Act though not in international law, and, therefore, to justify its application to United States nationals in employment there. There is little doubt that this is what the court meant, but what it said is somewhat misleading.

VOTING IN THE SECURITY COUNCIL—UNITED STATES PROPOSALS [1]

On March 11, 1948, the United States, in response to the request contained in the Interim Committee Resolution of January 9, submitted the following proposals to the Committee:—

A. The Interim Committee should study the categories of decisions which the Security Council is required to make in carrying out the functions entrusted to it under the Charter and the Statute of the International Court of Justice, and should report to the General Assembly those categories of decisions which in its judgment, in order to ensure the effective exercise by the Security Council of its responsibilities under the Charter, should be made by an affirmative vote of seven members of the Security Council, whether or not such categories are regarded as procedural or non-procedural. (A provisional proposed list of such categories is attached.)

B. The Interim Committee should recommend to the General Assembly:

(1) That the General Assembly accept the conclusions of the Interim Committee's Report, and

(2) That the General Assembly as a first step recommend to the permanent members of the Security Council that they mutally agree that such voting procedures be followed, and that steps be taken to make their agreement effective.

The Interim Committee should recommend to the General Assembly that in order to improve the functioning of the Security Council, the General Assembly recommend to the Permanent Members of the Security Council that wherever feasible consultations

[1] U.N. doc. A/AC.18/41, Mar. 10, 1948. By a resolution adopted on Nov. 21, 1947, the General Assembly requested its Interim Committee to—

'1. Consider the problem of voting in the Security Council, taking into account all proposals which have been or may be submitted by members of the United Nations to the second session of the General Assembly or to the Interim Committee;

'2. Consult with any committee which the Security Council may designate to co-operate with the Interim Committee in the study of the problem;

'3. Report, with its conclusions, to the third session of the General Assembly, the report to be transmitted to the Secretary-General not later than July 15, 1948, and by the Secretary-General to the Member States and to the General Assembly'.

On Jan. 9, 1948, the Interim Committee, by resolution, asked that proposals on the problem of voting in the Security Council be transmitted to the Secretary-General on or before Mar. 15, 1948.

should take place among them concerning important decisions to be taken by the Security Council.

Provisional List of Categories of Security Council Decisions which the United States proposes should be made by an Affirmative Vote of Seven Members, whether or not such Categories are regarded as Procedural or Non-procedural.

1. Decisions with respect to admission of States to membership in the United Nations, pursuant to Article 4 (2).

2. Decisions to bring a question relating to the maintenance of international peace and security before the General Assembly pursuant to Article 11 (2).

3. Decisions to request the recommendation of the General Assembly concerning a matter relating to the maintenance of international peace and security being dealt with by the Security Council pursuant to Article 12 (1).

4. Decisions to cease dealing with a matter relating to the maintenance of international peace and security pursuant to Article 12 (2).

5. Decisions with respect to the consent of the Security Council to the notifications made by the Secretary-General under Article 12 (2).

6. Decisions with respect to the request directed by the Security Council to the Secretary-General that he convoke a Special Session of the General Assembly under Article 20.

7. Submission of annual and special reports from the Security Council to the General Assembly pursuant to Article 24 (3).

8. Decisions of the Security Council as to whether a matter is procedural within the meaning of Article 27 (2).

9. Determination of the parties to a dispute and the existence of a dispute for the purpose of deciding whether a member of the Security Council shall be required to abstain from voting pursuant to Article 27 (3).

10. Decisions concerning the manner of the organisation of the Security Council pursuant to Article 28 (1).

11. Decisions concerning the time and place of its regular and periodic meetings pursuant to Article 28 (2) and Article 28 (3).

12. Establishment of subsidiary organs pursuant to Article 29.

13. The election of a President pursuant to Article 30.

14. Adoption of Rules of Procedure pursuant to Article 30.

15. Decisions to permit the participation of Members of the United Nations in the discussion of any question where the Council considers that the interests of the Member are specially affected pursuant to Article 31.

16. Decisions to invite a Member State which is not a Member of the Security Council, or a State not a Member of the United Nations which is a party to a dispute under consideration by the Council, to participate without vote in the discussion relating to the dispute pursuant to Article 32.

17. Decisions with respect to conditions for the participation of a State which is not a Member of the United Nations in the Security Council discussions in accordance with Article 32.

18. Decisions to consider and discuss a matter brought to the attention of the Council.

19. Decisions to call upon the parties to a dispute to settle their dispute by peaceful means of their own choice pursuant to Article 33 (2).

20. Decisions to investigate a dispute or a situation which might lead to international friction or give rise to a dispute, pursuant to Article 34.

21. Decisions to recommend appropriate procedures or methods of adjustment of a dispute or situation endangering the maintenance of international peace and security, pursuant to Article 36 (1).

22. Decisions of the Security Council pursuant to Article 36 (3) to recommend to the parties to a legal dispute that the dispute should be referred by the parties to the International Court of Justice in accordance with provisions of the Statute of the Court.

23. Decisions to make recommendations at the request of all parties to a dispute with a view to its pacific settlement, pursuant to Article 38.

24. Decisions to request assistance from the Economic and Social Council pursuant to Article 65.

25. Reference of a legal question to the International Court of Justice for an advisory opinion pursuant to Article 96 (1).

26. Decision to convoke a conference to review the Charter prior to the Tenth Annual Session of the General Assembly pursuant to Article 109 (1).

27. Decision to convoke a conference to review the Charter subsequent to the Tenth Annual Session of the General Assembly pursuant to Article 109 (3).

28.[2] Election of judges of the International Court of Justice pursuant to Article 4 (1), Article 10 (1) of the Statute of the Court. (Article 10 (2) of the Statute.)

29. Decisions of the Security Council determining the conditions under which a State which is a party to the present Statute of the International Court of Justice, but which is not a Member of

[2] These decisions are made by 'an absolute majority of votes in the General Assembly and in the Security Council'.

the United Nations, may participate in electing the Members of the Court pursuant to Article 4 (3) of the Statute of the Court.

30.[2] Appointment of conferees in connection with election of judges of the International Court of Justice pursuant to Article 12 of the Statute of the Court. (Article 10 (2) of the Statute.)

31. Determination of the date of election of judges of the International Court of Justice pursuant to Article 14 of the Statute of the Court.

An important statement on these proposals was made before the Interim Committee on March 15, 1948, by Prof. Philip C. Jessup, U.S. Deputy Representative in the Committee. Prof. Jessup said [3]: 'It is my intention, at this time, to limit my remarks to the purposes of the United States proposals and to the general point of view which has given rise to the proposals, reserving my comments on the technical aspects until a later time.

The United States considers the problem of voting in the Security Council to be one of the greatest consequence and importance to the success of the United Nations. The Secretary of State in his address to the General Assembly last September stated: 'The exercise of the veto power in the Security Council has the closest bearing on the success and the vitality of the United Nations . . . . The abuse of the right of unanimity has prevented the Security Council from fulfilling its true functions. That has been especially true in cases arising under Chapter VI and in the admission of new members'. As the Secretary went on to point out, we had reluctantly come to the conclusion that the most practical method for improving this situation would be through liberalisation of the voting procedure in the Security Council.

Different ways have been suggested for obtaining this objective. There are before the Committee proposals of Argentina and of New Zealand which suggest that the way to accomplish the objective is by amending the Charter. The United States suggests a different method. We do not believe that there is a short cut to peace. The amendment of the Charter, as everyone recognises, requires the concurrence of the permanent members of the Security Council and proposals for amendments thus do not avoid the necessity for unanimity. The proposals of the United States are advanced in the conviction that they suggest the most practical method for moving toward the objective of liberalising the voting procedure in the Security Council.

[3] Statement released to the press by the U.S. Mission to the United Nations on the same date.

The United States recognises the basic importance of a genuine unanimity among the permanent members if the Security Council and in fact if the entire United Nations is to achieve its maximum success. The United States also recognises that in connection with the most important decisions of the Security Council such as those for enforcement action under Chapter VII of the Charter, a voting formula requiring unanimity among the permanent members is a necessity and corresponds to the political realities of the international situation. This was well pointed out by Ambassador Austin in his statement to the General Assembly as far back as October 30, 1946 :

'The principle of unanimity of the Great Powers has from the first—and by general agreement—been limited in its application as a voting procedure to matters essential to the maintenance of international peace and security. The Charter requires unanimity of the major powers only in substantive decision by the Security Council. There is no requirement for unanimity in the Assembly, in the Economic and Social Council and in the Trusteeship Council. . . .

'This does not mean that unanimity or the closest possible approximation to it is not to be desired and striven for in all these organs. It means only that it was not deemed essential to apply the principle to the voting procedures.

'Those organs and agencies do not have the power to enforce the law. That power rests with the Security Council and that is the reason why the Members of the United Nations applied the principle of unanimity to the voting procedures of the Security Council and not to the voting procedures in any of the other institutions of the United Nations.

'The large nations that are Permanent Members of the Council possess the power to keep peace in the world—to enforce observance of the law. The Charter does not give them that power. It recognises that power and places obligations upon these nations to use that power in accordance with the law'.

The United States continues to adhere to the viewpoint which Ambassador Austin expressed so forcefully more than two years ago. The proposals of the United States suggest 31 separate items which come up in a study of the veto. The proposals of China, the United Kingdom, and New Zealand contain other suggestions, and additional ones may be raised in the course of our discussion. I agree that the study of those items will necessarily be a technical study. The problem is a technical one. There is no simple formula which can be applied as a 'cure-all' and which will automatically result in the liberalisation of the voting procedure

and immediate improvement in the effectiveness of the Security Council. The United States feels that progress can best be achieved in the General Assembly through careful study. To quote Mr. Dulles concerning the nature of the study : ' It is not a study which is designed to produce any predetermined result or to produce any specific diminution of the veto power, but it is a study of the problem to the end that the General Assembly next year will be able to approach this problem with more light and less heat than was the case at the last General Assembly. We felt that a good deal of violence and antagonism which marked the discussions in the General Assemblies both in 1946 and 1947 was largely due to the fact that the problem had not been adequately studied and its difficulties adequately perceived '.

To come to the specific United States proposals which are now before this Committee, the United States first suggests that the Interim Committee should study the categories of decisions which the Security Council is required to make in carrying out the functions entrusted to it under the Charter and the Statute of the International Court of Justice and should report to the General Assembly those categories of decisions which in its judgment, in order to insure the effective exercise by the Security Council of its responsibilities under the Charter, should be made by an affirmative vote of seven members of the Security Council.

It is apparent from the resolution of November 21 that in giving the Interim Committee this task the General Assembly was exercising its power to make recommendations ' relating to the powers and functions of any organs of the United Nations ' (Article 10 of the Charter). It therefore seemed most appropriate to us that the study in the Interim Committee should deal primarily with the functioning of the Security Council and that the Interim Committee conclusions and the General Assembly recommendations should be directed to the desired result; namely, to the liberalisation of voting procedures in connection with those decisions of the Security Council where such liberalisation is most likely in fact to result in the improved operation of the Council.

The United States proposal goes on to recommend that the General Assembly accept the conclusions which the Interim Committee may reach on this subject and ' that the General Assembly as a first step recommend to the Permanent Members of the Security Council that they mutually agree that such voting procedures be followed and that steps be taken to make their agreement effective '. We recognise that after the General Assembly has made recommendations for liberalisation of the

voting procedures, the task of accomplishing such liberalisation may be a difficult one. The most effective way of securing improvement in the operations of the Security Council would be through agreement of the permanent members. Mr. Dulles stated this to the First Committee of the General Assembly and Ambassador Austin repeated the statement before this Committee on January 9. 'We realise that without such agreement, it will be difficult to accomplish great practical results. Charter amendment requires the approval of all five. It may perhaps prove possible to get agreement on certain Charter amendments and certainly there is an important area in which existing procedures could be liberalised without alteration of Article 27.'

We believe that the permanent members will all give great weight to whatever recommendations may be made by the General Assembly on this subject and we are therefore proposing that the General Assembly recommend to the permanent members that they mutually agree to follow the voting procedure recommended by the General Assembly and to take steps to make that agreement effective.

We have submitted a list of Security Council decisions which in our view should as a matter of principle be made by any seven members of the Security Council; in other words, where there should be no veto. I shall not comment in detail at this time on this list. It suffices to say that a number of these decisions are well-established as procedural in the practice of the Security Council and that in other instances a voting procedure not involving the veto is prescribed by the Charter. However, the list of categories of decisions also includes a number of decisions where either no precedent as to voting procedure has as yet been established in the Security Council or where under existing practice of the Council, a negative vote by a permanent member has been considered a veto. It would perhaps be appropriate to note at this time two or three of the more important of these decisions where we firmly believe that the voting procedure should be liberalised.

In the first place, there is the question of applications for membership. This is item 1 on our list. Ten of the 23 vetoes in the Security Council have related to membership problems. This is not the time nor place for recriminations but I would be less than frank if I failed to point to the most flagrant example of the abuse of the veto, the veto of Italy's membership application by the Soviet Union, not once but two times. This was done in the face of overwhelming support for Italy's application in the Security Council and later in the General Assembly. This leads

inescapably to the conclusion that the Soviet vetoes of the Italian United Nations membership application can be interpreted only as an expression of lack of friendship of the Soviet Union for the people of Italy. A way must be found to make such an injustice impossible. The Italian people must not be denied the right of United Nations membership which they so richly deserve. It should be noted that one phase of the membership problem has been referred by the General Assembly to the International Court of Justice for an advisory opinion. The Court's opinion, when it is given, should be of assistance in this study.[1]

We have also suggested the elimination of the veto in connection with most of the decisions of the Security Council arising under Chapter VI which relates to the pacific settlement of disputes. The Secretary of State in his address to the General Assembly indicated that the United States would be willing to accept the restriction or elimination of the veto in connection with all decisions under Chapter VI. We have not, however, at this time, suggested its elimination in connection with the Security Council's authority under Article 37 (2) to recommend terms of settlement of disputes. While the United States would be willing to accept the elimination of the veto in connection with the Security Council's recommendations under Article 37 (2), nevertheless, as was pointed out by Mr. Dulles to the First Committee of the General Assembly in his statement of November 18, this provision raises certain special problems. Therefore, pending further study, by the Interim Committee, the United States did not include this provision in its list.

We are also suggesting that the veto should never be utilised to prevent the Security Council from obtaining assistance from other organs of the United Nations : the General Assembly, the Economic and Social Council, the International Court of Justice. We believe that the firm establishment of this principle would result in greater co-ordination of the work of the various organs of the United Nations and would be of great assistance to the Security Council.

It should be emphasised that the list of categories of Security Council decisions which the United States proposes should be made by affirmative vote of seven members, is strictly a provisional list. The United States hopes that the Interim Committee will study not only these categories of decisions but all categories of decisions which the Security Council must make. The creation of

[1] The advisory opinion of the International Court was given on May 28. It will be fully reported in the next number of this *Quarterly*.—Ed.

a subcommittee would seem to be a useful procedure for this purpose. It may develop in the course of the study that there are a number of other decisions where the effective functioning of the Security Council would be furthered through establishment of voting procedures not requiring the concurrence of the permanent members. The United States is entering into this study in the Interim Committee with an open mind and without any preconceived judgment as to the conclusions that should emerge from the Interim Committee.

The second part of the United States proposal relates to consultation among permanent members. The United States suggests that the 'Interim Committee should recommend to the General Assembly that in order to improve the functioning of the Security Council, the General Assembly recommend to the Permanent Members of the Security Council that whenever feasible, consultations should take place among them concerning important decisions to be taken by the Security Council'. Even in the event of substantial liberalisation of voting procedures as is contemplated in the first part of the United States proposal, it is still desirable that there should be agreement and there will be many decisions of the Security Council which require agreement among the permanent members. Consultations on such decisions, and also on some important decisions not requiring unanimity, should take place whenever feasible; that is, whenever they are likely to produce constructive results. We believe that there is likely to be agreement on the desirability of such consultations. The General Assembly resolution of December 13, 1946 'requests the Permanent Members in consultation with one another, to insure that the use of the special voting privilege does not impede the Security Council in reaching decisions promptly'. The General Assembly resolution of November 21, 1947, requests consultations among the permanent members on the problem of voting. The United States proposal goes somewhat further than either of the previous General Assembly resolutions but goes no further than the statements of the permanent members themselves. All of the permanent members have stated in the General Assembly that such consultations are desirable. We believe that the second part of our proposal complements the first part and that its adoption will assist the Security Council in effectively performing its functions.

In conclusion, we sincerely hope that the studies in this Committee will result in a fuller understanding of this extremely difficult and technical subject, and that as a result of this study, this Committee will reach enlightened and constructive conclusions

that have the support of the overwhelming force of world opinion. If those conclusions are converted into realities through their adoption in practice, the United Nations will be a more effective instrument for the accomplishment of its great purposes.

IMPERIAL CONSTITUTIONAL DEVELOPMENTS

I.—INDIA AND PAKISTAN

Under the Indian Independence Act, 1947, India and Pakistan became 'independent Dominions', within the British Commonwealth of Nations, as from August 15, 1947. In a telegram addressed on that day to the Secretary-General of the United Nations, the Foreign Minister of Pakistan expressed the view that 'both the Dominions of India and Pakistan should become Members of the United Nations *automatically* with effect from the 15th of August'. At the same time, he made it clear that if this view was not acceptable, his telegram was to be considered as a formal application for admission. The Security Council adopted the second course and treated the communication from Pakistan as an application for admission under Article 4 of the Charter. As no opposition to the application was anticipated, the Council departed from its usual procedure in that the case was not referred to the Membership Committee for preliminary consideration. It was examined by the full Council at a meeting held on August 18, 1947, which unanimously resolved to recommend the admission of Pakistan to the General Assembly.

In the course of these proceedings there arose two points which may be worth brief mention on account of their relevance to the interpretation of the Charter. India (not itself a member of the Council) asked for a hearing under Article 31 of the Charter, on the grounds that her interests were specially affected. The Council granted that hearing without however committing itself to the view that territorial contiguity or previous historical association necessarily established special interests, in the sense of Article 31, in relation to the admission of a new Member. The second point of interest concerned the position of a Member from whose territory a new State was being carved out. In the case of India, no member of the Council challenged the Dominion's continuing membership, but the representative of Poland placed it on record that 'this situation cannot be quoted in the future as a precedent in the event of another State splitting up into a few States, thereby depriving the Security Council of the privilege of making recommendations with regard to new Members'.

The Council's recommendation was considered by the General

Assembly on September 30, 1947, and Pakistan was admitted by fifty-three votes to one. The dissenting vote (formally withdrawn on October 20) was cast by Afghanistan on the ground that it could not recognise the North-Western frontier as part of Pakistan so long as the inhabitants were not afforded an opportunity to determine for themselves whether they wished to be independent, or acquiesced in being attached to the new Dominion.

The enthusiastic welcome given to Pakistan in August-September, 1947, by the representatives of India in the Security Council and the General Assembly soon gave way to rather different sentiments. On January 1, 1948, India addressed a communication to the United Nations complaining that so far back as September, 1947, Pakistan had imposed an economic blockade on Kashmir, which was followed, first, by a violent propaganda campaign and, later, by large-scale military assistance to the tribal forces which had descended on the Vale of Kashmir. In the emergency thus created, the State of Kashmir had asked for military assistance from India and notified its desire to accede to the Dominion; India had agreed to Kashmir's accession, but only on condition that it was confirmed by a plebiscite, to be held, if necessary, under international auspices. The Security Council began the discussion of the Indian complaint on January 15, 1948, by which time it was confronted by a long chain of counter-charges by Pakistan. Foremost among those charges was that India had never wholeheartedly accepted the partition scheme; that an extensive campaign of genocide had been carried out and was still in progress against Muslims in certain areas of the Indian Union; that Junagadh and some other States, which had acceded to Pakistan, had been unlawfully occupied by Indian armed forces; that India had blocked the implementation of agreements relating to, or arising out of, partition between the two Dominions; and that, by various acts of aggression and by the present threat of direct military attack, India was aiming at the destruction of Pakistan.

On January 17, 1948, by way of a preliminary measure, under Article 40 of the Charter, the Security Council called on both Governments to take immediate measures to improve the situation and to refrain from any act which might aggravate it. This was followed three days afterwards by the setting up of a Commission of the Security Council for the purpose of investigating the situation on the spot and of acting as mediators. The despatch of the Commission was, however, held up pending further negotiations between the delegations of the two Dominions at Lake

Success, and the consideration of the situation in fuller detail by the Security Council itself. These discussions occupied a great deal of the Council's time during the period January-April, 1948, and resulted, on April 21, in a long resolution embodying a series of recommendations on the settlement of the Kashmir dispute. Starting from the proposition that the dispute was one, the continuation of which was likely to endanger international peace and security, the Council resolved that a five-member Commission was to proceed at once to the spot and place its good offices at the disposal of the two Governments in order to fulfil the Council's recommendations. The latter included the withdrawal of outside tribesmen, of Pakistan nationals not normally resident in Kashmir and of Indian forces; a plebiscite to decide whether the State should accede to India or Pakistan; the setting up of a Special Plebiscite Administration headed by a nominee of the Secretary-General; a due share for all major political groups in the government of the State pending the plebiscite; safeguards against victimisation; and the protection of minorities.

This decision does not, of course, dispose of all outstanding disputes between the two Dominions and the examination of the position at Junagadh, the question of genocide and the implementation of the partition agreement still continues.

This brief sketch of recent developments in the external affairs of the two Dominions would be incomplete without a short reference to a delicate problem which had been referred to the United Nations long before the partition of India. On June 22, 1946, the Government of India requested that the question of the treatment of Indians in the Union of South Africa be included in the agenda for the second part of the First Session of the General Assembly. More particularly, India protested against the passage by the Union Government, in 1946, of the Asiatic Land Tenure and Indian Representation Act, the result of which was the complete segregation of Indians as regards both trade and residence. In the Indian view, this enactment violated the provisions of the United Nations Charter on human rights and was incompatible with existing treaties between the Indian and South African Governments. On December 18, 1946, the General Assembly, in a formal resolution, expressed the 'opinion' that the treatment of Indians in the Union should be in conformity with the international obligations under the agreements concluded between the two Governments and the relevant provisions of the Charter; and requested the two Governments to report at the next session regarding the measures adopted to this effect. In its report to

the Second Session of the Assembly, the Dominion of India complained that the South African Government had completely ignored the resolution of the General Assembly and that, indeed, it had refused to accept the terms of the resolution as a basis of discussion. This report and the reply of the South African Government were duly considered by the First Committee of the General Assembly. It formulated a resolution reaffirming the previous one of December 8, 1946, and requesting the two Governments to enter into discussions at a Round Table Conference without any further delay and to invite Pakistan to take part in such discussions. However, this resolution failed to secure the requisite two-thirds majority and the Plenary Meeting of the Assembly, which discussed it on November 20, 1947, was unable to reach a final decision. The matter is still in abeyance.

II.—CEYLON

Fully responsible status within the British Commonwealth of Nations has now been conferred upon Ceylon. The process that began with the enactment of the Ceylon (Constitution) Order in Council, 1946, replacing the former State Council by a two-chamber Legislature and the Executive Committees by a Cabinet of Ministers responsible to that Legislature, and introducing virtually full self-government in internal affairs,[1] has thus been completed.

The necessary prelude to the grant of fully responsible status was the conclusion of agreements between the United Kingdom and Ceylon on matters of defence and external affairs (legislation in respect of which was, until then, exclusively the province of His Majesty in Council) and certain matters affecting public officers. Three such agreements were concluded on November 11, 1947.

The Defence Agreement secures such reciprocal military assistance for the security of the territories of Ceylon and the United Kingdom, for defence against external aggression and for the protection of essential communications as their mutual interest requires. The United Kingdom may, by mutual agreement, base such naval and air forces and maintain such land forces in Ceylon as may be required for these purposes, and will furnish Ceylon with such military assistance as may be required towards the training and development of Ceylonese armed forces.

By the External Affairs Agreement, Ceylon declared its readiness to adopt and follow the resolutions of past Imperial Conferences and to observe the principle and practice observed

[1] These developments were reported in Vol. 1 *International Law Quarterly*, p. 227.

by the members of the Commonwealth in regard to external affairs generally. Ceylon is to be represented in London by a High Commissioner and there is to be a High Commissioner for the United Kingdom in Ceylon. Upon the request of Ceylon the United Kingdom is to communicate to the Governments of the foreign countries with which Ceylon wishes to exchange diplomatic representatives, proposals for such exchange. In any foreign country where Ceylon has no diplomatic representative, the United Kingdom representative may, at the request of Ceylon, act on behalf of Ceylon. The Government of the United Kingdom is to lend its full support to any application by Ceylon for membership of the United Nations, or of any specialised international agency as described in Article 57 of the Charter of the United Nations. These agreements were expressed to take effect on the day when the constitutional measures necessary for conferring on Ceylon fully responsible status within the British Commonwealth of Nations should come into force.

It remained to enact the Ceylon Independence Act and to amend the Ceylon (Constitution) Order in Council, 1946, so as to bring it into a form suitable for a fully self-governing member of the British Commonwealth. The necessary amendment was effected by the Ceylon Independence Order in Council, 1947 (dated December 19), bringing about the following principal changes :

Firstly, in place of the Governor there is now a Governor-General who, in the exercise of his powers and functions will, generally speaking, act in accordance with the constitutional conventions applicable to the exercise of similar powers and functions in the United Kingdom by His Majesty. Secondly, the power reserved to His Majesty to make laws for Ceylon in matters relating to defence and external affairs was abolished, and the power to amend or repeal any Order in Council in its application to Ceylon was limited to the Assent to such Bills as should be certified to have the votes of not less than two-thirds of the whole number of members of the Ceylon House of Representatives cast in its favour. Thirdly, the provisions for the reservation of Bills for His Majesty's pleasure were revoked.

These constitutional developments have made it possible for Ceylon to attain a fully responsible status within the British Commonwealth of Nations.

III.—MALTA

On November 10, 1947, His Royal Highness the Duke of Gloucester, on behalf of the King, opened the new Maltese

Legislative Assembly, thus marking the beginning of a new phase in Malta's constitutional development.

It will be recalled that for over ten years, between 1921 and 1933, Malta enjoyed full legislative and administrative responsibility in the conduct of its national affairs, matters of Imperial interest and defence alone being reserved to the Imperial Government. In 1930, however, as the result of a number of controversies, the British Prime Minister stated in the House of Commons that 'His Majesty's Government, with considerable reluctance, have decided that they have no alternative but to sanction a temporary suspension of the Constitution'. A Royal Commission was appointed in 1931 'to inquire into and report upon the political situation in the Island'. The Royal Commission's report which was issued on January 29, 1932, found that no grounds existed 'to support the opinion that the Maltese people are unable to manage their internal affairs and we trust that the Imperial Government may be willing to take our view that the Constitution should be restored'. It was so restored on April 25, 1932, subject to two major amendments relating to the use of the Italian language in the Maltese elementary schools and the appointment and control of judges of the Superior Courts of Malta. Unfortunately, new recriminations arose between the two sides of the Maltese dyarchy and on November 2, 1933, the Imperial Government resorted, for the second time, to the suspension of the Constitution on the ground that, in the Colonial Secretary's view, 'a state of emergency existed and continued to exist in the Island'. The result meant a return to the position of 1930 when, in the words of the Royal Commission, the Governor of Malta became 'an autocrat, taking such advice as he might think fit'. The Constitution was actually revoked by the 'Malta (Letters Patent) Act, 1936' and replaced by the Letters Patent of August 12, 1936, which imposed a strict Crown Colony rule in Malta. A further Constitution in 1939 (the 'MacDonald Constitution') provided for a partly-elected Council of Government, in addition to an Executive Council of five ex officio members and such other persons as the Governor might from time to time appoint with the approval of the Secretary of State for the Colonies.

On June 10, 1940, Italy entered the war and, during the next four years, the people of Malta were subjected to unprecedented sufferings which they endured with that gallantry and courage which earned for them the George Cross, and which, in the words of His Majesty, 'will long be famous in history'. On July 7, 1943, the Secretary of State for the Colonies announced in the House

of Commons the intention of H.M. Government of again granting responsible government to Malta so soon as hostilities should be concluded. Eventually, in January, 1946, Sir Harold MacMichael, G.C.M.G., D.S.O. was appointed to visit Malta as Constitutional Commissioner, to consider with representatives of the Maltese people means of implementing the Government's declaration of 1943.[1]

Between July and September of 1946 discussions took place between Sir Harold and a strong committee nominated by the Maltese National Assembly; the result of these discussions was the new Constitution granted by His Majesty by Letters Patent of September 5, 1947. It re-establishes, with some modifications, the dyarchical system of 1921, giving the Maltese people full control over all matters save those directly affecting Imperial interests. These reserved powers were the subject of earnest discussion in the negotiations of 1946 and, as a result, the old reserved powers of 1921 have been somewhat modified. Thus police have been removed from reserved matters, and so has 'trade with any place out of the Island' (section 41 (1) (*h*) of the Letters Patent of 1921). Another striking difference between the 1921 Constitution and that of 1947 is that whereas the former provided for a Senate composed of 17 members, the new Letters Patent make no direct provision for a Second Chamber. Section 25, however, expressly empowers the Legislative Assembly to establish a Senate and to prescribe its constitution, powers and functions. But no Bill for the establishment of a Second Chamber is to be introduced into the Legislative Assembly within ten years from the coming into force of the Constitution. It is thus left to the Maltese people themselves to decide whether they want a Second Chamber, a question on which the National Assembly and its representative committee were much divided.[2]

Other important provisions of the new Constitution are contained in section 46, which provides that the official languages of Malta shall be English and Maltese; in section 35, reserving for His Majesty's assent Bills subjecting persons not of Maltese birth or descent to any disabilities or affecting any other reserved matter; and sections 42 to 45 protecting the Judiciary in their salaries and terms of service and stipulating that no person shall be appointed a Judge who has not completed twelve years at the Maltese Bar or in the Magistracy. Section 52 establishes a reserved Civil List for the salary of the Governor and for other reserved matters, and section 53 provides for religious toleration. By section

[1] Colonial Office, Malta: Report of Constitutional Commissioner, 1947 (Col. No. 207).
[2] *Ibid.*, pp. 17–20.

37, power is reserved to His Majesty to disallow laws within one year of the date of the Governor's assent thereto, a power which is rarely used in responsible government Constitutions. Section 59 further reserves to the Crown full power to make by Order in Council such laws as may be necessary in an emergency to maintain public safety and order, supplies and services.

By Letters Patent of the same date, constituting the office of Governor and Commander-in-Chief of Malta, it is provided, *inter alia*, that there shall be an Executive Council, a Nominated Council and a Privy Council for Malta. The Executive Council is to consist of Ministers; the Nominated Council of the Lieutenant-Governor and the Legal Secretary ex-officio and of one officer each of the Royal Navy, the Regular Military Forces of the Crown, and the R.A.F. The Privy Council consists of members of both the Executive Council and the Nominated Council, and is to be summoned by the Governor for the consideration of matters specified in instructions, under His Majesty's Sign Manual and Signet, or of other matters not exclusively within the responsibility of the Executive Council. Administrative machinery is thus provided to work within the framework of the new Constitution; and, beginning as it does under the excellent auspices of mutual agreement, there is every hope that the new Constitution will fulfil the legitimate desire of the Maltese people for responsible government whilst providing for the necessities of Malta's special position as a premier naval base and military fortress within the Commonwealth and Empire. It is noteworthy in this connection that the new Constitution, having been granted by Letters Patent, can now only be revoked by Act of Parliament, no power having been reserved to revoke the Constitution by Prerogative Instrument.

QUESTIONS OF PROPERTY AND NATIONALITY IN THE PEACE TREATIES OF 1947 [1]

The main burden of this problem is to find out how far the technique of peace-making has crystallised in the matter of private property and interests. Emphasis should, accordingly, be placed on those provisions of the Peace Treaties with Italy, Roumania, Bulgaria, Hungary and Finland which departed from the principles of the 1919 settlement or reflected certain new trends in international law. In the treatment by the Peace Treaties of

[1] Summary of a paper read to the Grotius Society by Dr. Andrew Martin on March 3, 1948. The full text will be printed in Vol. 34 of the Society's 'Transactions'.

Allied property wrongfully removed by the enemy; of pre-war Allied property in enemy territory, and of enemy property in Allied territory, one could discover many interesting departures from precedent. One of the most striking is the new principle that in the case of looted property, restitution is to be made irrespective of any subsequent transactions (not excepting transactions involving *bona fide* purchasers for value); and that which results in the suspension not only in enemy, but also in neutral States, of the municipal rules for the protection of *bona fide* holders. Surprisingly, the treaties neglect to provide for compensation, at the expense of the enemy States, to the innocent parties thus affected; they leave the matter entirely in the hands of the Governments concerned. It is hardly less surprising that no provision is made for the surrender, by the Allied national entitled to restitution, of the financial or other consideration he may have received at the time of expropriation. It is noteworthy also, that in claiming restitution Allied Governments are not required to prove that the property had been owned by one of their own nationals; it is sufficient to prove that it had been removed from their territory. That is only one example, among many, of the treaties' bias for territorial, as distinct from personal, jurisdiction. As regards the restoration of pre-war Allied property in enemy territory, it is remarkable that, on the whole, stronger protection is given to *rights in personam* than to *rights in rem*: the former are to be restored in full under any circumstances, whereas for property which cannot be physically restored, compensation is payable, only at the rate of two-thirds of the post-war value. It is interesting to note that whereas, in similar cases, the treaties of 1919 left the amount of compensation for Mixed Arbitral Tribunals to decide, the present treaties operate at a fixed rate. In general, the treaties show a strong prejudice in favour of restoration *in specie* : the most striking example is the nullification of all war measures affecting property as against their express validation in the treaties of 1919. A point of considerable practical importance is the absence of any protection for Allied property against post-war nationalisation or expropriation programmes, as long as such measures do not discriminate against Allied property. So far as the retention and liquidation of enemy property in Allied territory is concerned, this was additional to, and not part of, reparations in the treaties of 1919; under the present treaties, however, it definitely assumes the character of reparations and is, in fact, the only form of reparations exacted by the Western Powers as distinct from the Soviet Union and the neighbours of the former enemy States. The rule that enemy property in excess

of reparation claims is returnable to the owners, raises many questions of great practical importance; and more especially the question, whether return is to be made to the owners direct, or to, or through, their respective Governments.

On the other hand, the treaties introduce a new definition of the categories of persons entitled to special protection as 'United Nations nationals'. This term means individuals who were nationals of any one of the United Nations (and corporations and associations which were organised under the laws of any one of the United Nations) at the coming into force of the treaties, provided they had already had this status on the date of the Armistice. The definition is interesting because it creates a notable exception to the general rule that the nationality of claims must be continuous from the date of damage to the date of award. Not less interesting is, in regard to corporations, the adoption of a purely external test of nationality without any reference to the subsidiary criteria of *siège social* and 'control'. These latter tests are not, however, entirely absent from the treaties. The definition of seizable and retainable enemy property includes all property which had been subject to control during the war under Allied legislation prohibiting trade with the enemy; and it is well known that, in the majority of cases, such legislation took account also of enemy 'control' and of *siège social* in enemy territory. Yet another remarkable principle adopted by the treaties is that which stipulates that, regardless of nationality, persons who under the laws in force in Axis territory during the war, were treated as enemy, are entitled to the same protection as Allied nationals. The text does not say what is to be the test of such treatment and silence on this point is likely to give rise to a considerable amount of litigation. How far private individuals and corporations can directly enforce their claims under the Peace Treaties is not quite clear. The restitution and restoration of United Nations property and relationships arising from pre-war contracts comes under the jurisdiction of so-called Conciliation Commissions. These are in essence Mixed Arbitral Tribunals, but unlike their predecessors under the treaties of 1919, their competence seems to be exclusive in the sense that municipal courts retain no parallel jurisdiction. The treaties do not say whether private claimants have direct access to these Commissions; but there are weighty arguments in support of the view that they have. On the other hand, claims arising in respect of enemy property seizable and retainable under the treaties, are referred not to the Conciliation Commissions, but to the diplomatic machinery set up for the enforcement of the treaties. It appears fairly clear that private claimants have no direct access to this

machinery; on the other hand, it is difficult to see how claimants could be denied access to the municipal courts of the United Nations in cases where they are seeking to prove that property had been wrongfully seized by, or vested in, the Custodians of Enemy Property.

THE TRUST TERRITORY OF TOGOLAND: AN INTERNATIONAL PRECEDENT

The case of the petition of the Ewe people of the 'trust territory' of Togoland constitutes an important landmark in international practice. In the significant words of Mr. Francis B. Sayre, the President of the Trusteeship Council, the case is one 'which set a record-breaking international precedent'. Before we go on to examine the merits of such a claim it may be useful briefly to digest the relevant facts: At the All-Ewe Conference held at Accra, Gold Coast, West Africa, in the summer of 1947, a resolution was passed demanding the 'unification under a single administration of Eweland, which is at present partitioned between Togoland under French administration, Togoland under British administration, and the Gold Coast Colony'. The second session of the Trusteeship Council which opened on November 20, 1947, at Lake Success considered the petition of these 800,000 Togolanders and the intriguing question arose: Should the representatives of the All-Ewe Conference be allowed to make an oral statement in support of the petition? The suggestion of Mr. Pierre Ryckmans, the Belgian delegate, that one or two of the petitioners themselves (but not professional agents) be heard, was finally adopted, and further consideration of the petition was adjourned for two weeks during which, according to the Council's cable to the Ewe people, one representative should arrive in New York from Togoland. On December 8, 1947, Mr. Sylvanus Olympio, the Ewe representative, appeared before the Council and pointed out that the artificial dismemberment of the Ewe tribe under the League Mandate, as taken over by the United Nations Trusteeship system, had retarded their political progress as well as their economic and social solidarity; that there were no secondary schools or hospitals worthy of the name in both the French and British sectors; and that the French colonial policy of ultimate assimilation, unlike the avowed British policy of eventual independence, was disrupting the ethnic fabric and compromising the political future of the Ewe people. To the Chinese delegate's question whether the French or the British administration would be preferred by the Ewes, Mr. Olympio suggested a plebiscite to decide the point; he also requested an on-the-spot investigation by a Commission of

the Council. His reply to another question was that the Ewe people were not *now* asking for self-government but for unification, although their ultimate goal was independence under the Charter.

On December 9, 1947, the French representative stated what he described as 'the basic principles of the French and British policies in regard to the Ewe tribe'. While deploring the petition as tending to lead to 'tribal factionalism' he admitted that the economic situation in the French section of Togoland is worse than in the British section, but blamed it upon the policy of the Vichy Government. He concluded by giving an outline of a Franco-British joint programme 'designed to meet the Ewe demands'. Mr. Sylvanus Olympio rejected it as inadequate. On the following day, the Council decided to pass the petition to a sub-committee which should draft a resolution covering the needs of the Ewe people. On December 15, the Council adopted the sub-committee's resolution, which though recognising that the existing frontier dividing the Ewe people is a cause of 'real difficulty', recommended to France and Great Britain that both Powers should 'assist and encourage the Ewe tribe of Togoland in developing their capacity for self-government'. The resolution further provided for a visiting mission to Togoland to study the problem at first hand, the Council to resume consideration of the Togoland petition on receipt of the Commission's report.

The novel features of this case are broadly three: (a) This is the first occasion that the Trusteeship Council has granted an *oral hearing* to petitioners; (b) It is also the first time that an African representative from a trust territory has appeared before the Council; (c) The Ewe tribe, though numbering about 800,000, constitutes only a majority—albeit a preponderating one—of the entire population of Togoland under disparate French and British administrations.

The second point need not delay us as it is really linked up with the first and both may therefore be treated together. Now, there was no *express* provision in article 22 of the League Covenant for the submission of a petition to the League by the inhabitants of a mandated territory, although such right was generally recognised as existing in practice.[1] In article 87, paragraph (*b*), of the United Nations Charter, however, there is such express provision. But the further bold step of inviting one of the petitioners of a trust territory to give supporting oral evidence before the Trusteeship Council clearly went beyond previous international practice in the matter, though authority could be found for

[1] See Oppenheim–Lauterpacht's *International Law*, 6th ed., p. 196.

it in the omnibus provision of paragraph (*d*) of article 87 of the Charter.

The question naturally arising from the demands of the Ewe people is : What form of governmental machinery should be set up to administer Togoland under the authority of the United Nations Trusteeship Council? In this connection, it must be remembered that Togoland was partitioned by Great Britain and France by a bilateral Agreement dated July 10, 1919, and this instrument defines the arbitrary boundaries that still divide the Ewe people. If any alteration or amendment in the existing arrangement is to be made, the consent of both the United Nations General Assembly (through the Trusteeship Council) on the one hand, and of the British and French Mandatories on the other, is necessary.[2] Assuming that such mutual agreement to modify was forthcoming, we would next have to speculate whether the resultant administrative amalgam should be (i) a kind of *condominium* under Great Britain and France; (ii) a unitary government, all under Great Britain or all under France; (iii) a *neutral* government by a Commission of the United Nations Trusteeship Council.

The idea of a condominium, attractive and conciliating though it is, is nevertheless fraught with difficulties. The problems of Germany since 1945 and Sudan since 1899 are still with us. But the disturbing factors due to different historical developments of the two British and French spheres in Togoland since 1922 are not unfamiliar to the two Powers. In 1906 the same Powers resolved similar problems by their condominium over the New Hebrides, providing English and French courts, schools and other services in addition to a mixed court presided over by a neutral judge. But it is at least doubtful whether the inhabitants of the New Hebrides can be said to have gained very much by this amorphous arrangement. It is a compromise that would hardly be popular with the Ewe petitioners.

The question of settling whether Great Britain or France should be allowed to set up a unitary government is equally, if not more, insoluble. It was the mutual reluctance of both to give way one to the other which led to the condominium over the New Hebrides, with consequences just mentioned. If the United Nations had the authority to award the unitary administration to one only of the two Powers and if the plebiscite suggested by Mr. Olympio, of Togoland, were taken to determine the people's preference, the indications are that the Ewe people would most probably opt for the British rule.

[2] Articles 79 and 85 of the U.N. Charter.

Should the French prove intransigent over this second alternative solution, then the third alternative of a neutral Commission directly responsible to the United Nations through the Trusteeship Council should be considered. Although government of dependent territories by international Commissions has yet to stand its trial, it has the merit of impartiality both to the two mandatories as well as to the inhabitants of the trust territory themselves, besides affording a unique opportunity to the world of watching the practical implementation of the ideals of the Charter regarding international trusteeship by an organ of the United Nations itself. But since nothing prevents the Organisation itself being the Administering authority,[3] an experiment might be made by carrying 'the record-breaking international precedent' to its logical conclusion. For, the action so far taken by the Council over the Togoland petition has been characterised by Mr. F. B. Sayre, of the United States, the Trusteeship Council president, as 'a live example of implementing the United Nations Charter regarding Trusteeship areas. . . . By actions such as these, the Council is proving the belief that the words of the United Nations Charter regarding Trusteeship mean what they say, and that it is the Council's business to make them effective'. Let us hope that after the submission by the visiting Commission of its report, the United Nations will itself undertake the unified administration for which the Ewe people of Togoland now crave.

BYE-LAWS, RULES AND REGULATIONS OF THE INTERNATIONAL MONETARY FUND

Article XII (2) (*g*) of the I.M.F. Agreement provides that 'The Board of Governors, and the Executive Directors to the extent authorised, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Fund'. The Board of Governors have so far adopted twenty-four bye-laws between March 16, 1946 and November 1, 1947, and have provided that 'in the event of a conflict between anything in these bye-laws and any provision or requirement of the Articles of Agreement, the Articles of Agreement shall prevail. Bye-law 16 authorises the Executive Directors 'to adopt such Rules and Regulations, including financial regulations, as may be necessary or appropriate to conduct the business of the Fund', and subject to review by the Board of Governors. Under this bye-law, ninety-one rules and regulations had been adopted by November 1, 1947, grouped under fourteen heads.

[3] Article 81 of the U.N. Charter.

Of the bye-laws the following may be noted :

Bye-law 1 empowers the Executive Directors to establish and maintain agencies or branch offices of the Fund in the territories of members other than the U.S.A., the principal office being in Washington, D.C.

Bye-law 3 (*c*) provides that a quorum for any meeting of the Board of Governors shall be formed by a majority of the Governors, provided that they exercise not less than two-thirds of the total voting power.

Bye-law 12 forbids voting by proxy or by any other method than through properly designated alternates; but bye-law 13 sets out a procedure for postal or telegraphic voting. Under this procedure votes are to be cast within a prescribed period and if the votes received do not represent a majority of the Governors, exercising two-thirds of the total voting power, the motion is to be considered lost. This procedure is designed for action which cannot be postponed until the next regular meeting of the Board; while not warranting a special meeting.

Bye-law 15 is a general delegation of authority to the Executive Directors 'to exercise all the powers of the Fund except those reserved to the Board' by specific Articles of the I.M.F. Agreement.

Bye-law 20 provides for an annual external audit of the financial records and transactions of the Fund; the audit committee is to consist of three or five members, as the Executive Directors may prescribe at each audit, to be appointed each by a different member of the Fund : at least one person serving on each audit committee is to be nominated by one of the six members of the Fund having the largest quotas. The audit committee may also make suggestions for improving the system of accounting, internal financial control and documentary or other procedure of the Fund.

Rule C (13) provides that the working language of the Fund shall be English; the I.M.F. is therefore one of the few specialised agencies to have only one working language (the Universal Postal Union has French as its sole working language). There is no provision as to official language, but this again is presumably English.

Rules in Groups D–I deal with Membership and Quotas; Subscriptions; Par Values; Fund Transactions; Exchange Controls; Repurchases and Charges; those in Groups K and L with Limitations on use of the Fund, and Capital Transfers, and in general elaborate the financial operation of the Fund.

REVIEW OF CASES

FORFEITURE OF ILLEGAL IMMIGRANT SHIP

Naim Molvan v. *Att.-Gen.*

Judges—Lord Simonds, Lord Morton of Henryton and Sir Madhavan Nair.

Judicial Committee of the Privy Council (April 20, 1948).

This was an appeal from a judgment of the Supreme Court of Palestine dated November 11, 1946, dismissing an appeal from an order of the District Court of Haifa of June 14, 1946, whereby the forfeiture of the motor vessel *Asya* to the government of Palestine was confirmed and ordered. The appellant was the owner of the *Asya*.

On March 27, 1946, the *Asya* was sighted by a British destroyer some 100 miles south-west of Jaffa. She was flying no flag when first sighted, but hoisted a Turkish flag. The destroyer hailed her and signalled for her destination, but received no reply. A boarding party was sent from the destroyer, and when it arrived the Turkish flag was hauled down and the Zionist flag hoisted. The boarding party brought the *Asya* to Haifa escorted by the destroyer.

The *Asya* was a freighter with little accommodation for passengers, but the hold had been fitted with tiers of bunks. There were 733 persons on board, none of whom had any passport or travel document or visa to enter Palestine. On her arrival at Haifa the authorities boarded her on March 28, and put the passengers ashore, sending them to a clearance camp at Athlit, near Haifa, where they were detained.

It was not disputed that the *Asya* was a Turkish vessel or that the appellant, the owner, was neither a Palestinian citizen nor domiciled or resident in Palestine, nor was he in Palestine at any material time.

On April 18, 1946, the respondent filed in the District Court of Haifa, a summons for an order to confirm the forfeiture of the vessel to the government of Palestine under section 12 of the Immigration Ordinance, 1941, on the ground that 733 persons were on board the vessel within the territorial waters of Palestine, at Haifa, in circumstances in which the owner was deemed to have abetted the unlawful immigration of those persons. The District

Court made an order as asked and that decision was affirmed by the Supreme Court.

Judgment.

Lord Simonds, in delivering the Board's judgment, said, first, that their lordships saw no reason to suppose that the Immigration Ordinance, as amended (which was general in its application to persons of any nation and any creed), departed in the smallest degree from the term of the mandate or was in any measure repugnant to or inconsistent with its provisions. Secondly, the ordinance was not open to challenge on the ground that it offended against any established principle of international law, even on the assumption that it directly authorised, in the circumstances in which those acts were done, the seizure of the *Asya* on the high seas and her compulsory direction to a Palestine port.

The appellant had invoked the doctrine which was called 'the freedom of the open sea', alleging that under the shield of that doctrine the *Asya* was entitled, whatever her mission might be, to sail the open sea off the coast of Palestine. Their lordships could not assent to the proposition that any such right, unqualified by place or circumstance, was established by international law. But it further appeared to them that in the circumstances of the present case a discussion of the problem was somewhat academic. For the freedom of the open sea, whatever those words might connote, was a freedom of ships which flew, and were entitled to fly, the flag of a State which was within the comity of nations. The *Asya* did not satisfy those elementary conditions. No question of comity or of any breach of international law could arise if there was no State under whose flag the vessel sailed. Having no usual ship's papers which would serve to identify her, flying the Turkish flag to which there was no evidence that she had a right, hauling it down on the arrival of a boarding party, and later hoisting a flag which was not the flag of any State in being, the *Asya* could not claim the protection of any State, nor could any State claim that any principle of international law had been broken by her seizure.

A further question was whether any principle of international law was violated by an ordinance which, in the circumstances in which this ordinance was passed, penalised persons of whatever nationality and wherever resident who abetted or were deemed to have abetted an offence against its laws. The question narrowed down to whether they might be penalised by the forfeiture of their property which was within the jurisdiction. Their lordships had not been referred to any decision, nor to any textbook of authority, which suggested that the enactment by a State of a penalty so

expedient, if not essential, for the purpose of preventing an unlawful invasion of its territory was contrary to any established principle of international law. Even if any principle of general acceptance could be found which appeared to cover the case, it would still remain to be considered whether an exception must not be made in the case of a mandatory Power enforcing by action, which seemed to it essential, the policy which the principal allied Powers had entrusted to its charge.

The appeal was dismissed.

[Reported in *The Times*, April 20.]

MONACO. MONEY BORROWED DURING WAR. RIGHT TO RECOVER IN ENGLAND

Boissevain v. *Weil*

(King's Bench Division. April 23, 1948)

The Facts.

The plaintiff, Mr. Laurens Rijnhart Boissevain claimed from the defendant, Mrs Dora Weil, the sum of £6,000 as money lent to her in June and July 1944 when Monaco was in the military occupation of the enemy.

At the outbreak of war the plaintiff was the representative of a Dutch firm in France. After that country was overrun by the Germans he was assisted to get to Monaco but could proceed no further. The defendant was a British subject who had resided for many years on the Riviera. The parties met in Monaco and the defendant asked the plaintiff for a loan in order that she might pay someone to ensure that her son, a Jew, who was then in a concentration camp in Paris, should not be transferred. The plaintiff made three payments to the defendant of 320,000 francs each which she agreed to repay at the rate of 160 francs to the pound one month after an armistice was signed. As a security for the transaction the defendant gave the plaintiff three cheques drawn on a branch of the National Provincial Bank in England.

The defence was that the proper law of the agreement was that of Monaco, that the transactions were prohibited by Monegasque law and that in any event the agreement was unenforceable in this country as it infringed the Defence (Finance) Regulations, 1939, or, alternatively, that it amounted to trading with the enemy and was therefore unlawful at common law and under the Trading with the Enemy Act, 1939.

The Judgment.

Mr. Justice Croom-Johnson said that the agreements in question were made in Monaco, and that Monegasque law therefore applied to them. By a Monegasque decree of December 17, 1941, a French decree of April, 30, 1940, prohibiting foreign exchange transactions was applied to Monaco. But he was satisfied that that decree did not prohibit an undertaking to repay a debt in another country, and the transactions were not therefore prohibited by Monegasque or French law.

The second defence was that the transactions were illegal by English law and that they were therefore unenforceable in England, even if they were enforceable by the law of Monaco. It had been argued that the transactions were illegal at common law, as constituting trading with the enemy, and *Ertel Bieber & Co.* v. *Rio Tinto Co. Ltd.* ([1918] A.C. 861 and 34 T.L.R. 208), had been cited. But a contract was only illegal in so far as it afforded assistance to the enemy—*per* Lord Parker in *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) *Ltd.*, [1916] 2 A.C. 307 at p. 347 and 32 T.L.R. 624. He (his Lordship) could not believe that for a British subject to borrow money for vital necessities from one who was in effect a fellow prisoner in enemy territory was trading with the enemy. Moreover, he was not satisfied that Monaco was entirely within enemy occupation at the time for the purpose of the common law decisions.

The position under the Trading with the Enemy Act, 1939, was a little different. By section 2 (1) (*b*) of the Act a British subject in enemy occupied territory was himself a statutory enemy and by an Order in Council of August 15, 1940, Monaco was deemed to be enemy territory for the purpose of those Acts. Those statutes aimed at preventing British subjects in this country or elsewhere from making a contract with alien enemies or persons residing in enemy occupied territories, but they were not applicable in such a case as the present.

Lastly, it had been argued on the defendant's behalf that she had committed an offence under the Defence (Finance) Regulations, 1939, and that accordingly the transactions were prohibited and unenforceable. She relied on regulations 2 and 3A. These prohibited transactions in currency, and the handing over by the defendant of the three cheques was not such a transaction.

Judgment for the plaintiff for the amount claimed.

[Reported in *Weekly Notes*, May 15, 1948, p. 181.]

DIPLOMATIC PRIVILEGE. BREACH OF PROMISE ACTION

Price v. *Griffin*

(King's Bench Division. February 19, 1948)

At the commencement of the sitting Mr. Justice Birkett stated that he had the previous day received a communication on behalf of the Secretary of State for Foreign Affairs to the effect that a claim had been made by the authorities of the United States, on behalf of the defendant, that he was entitled to diplomatic immunity from the jurisdiction of the English courts. That claim had been recognised by the British authorities, but the details of the case had been reported to the United States authorities, who had been asked whether the privilege claimed would be waived. He (his Lordship) had been informed that a further communication would be addressed to him.

Counsel for the plaintiff commenced an explanation of the nature of the action, but Mr. Justice Birkett said he did not think he could listen to any statement of the facts. The certificate he had received from the Secretary of State for Foreign Affairs, which was completely binding on the court by decisions of the House of Lords, deprived the court of jurisdiction. The question whether the immunity claimed should be waived was apparently in abeyance and in the circumstances the proper course would be for the case to stand out of the list for the time being.

Upon counsel for the plaintiff saying that an appearance had been entered without protest, and that an application had been made by consent fixing the hearing of the case. Mr. Justice Birkett said that the defendant was quite unable himself to waive his diplomatic immunity, which could only be done by higher authority. The application for fixing a date was quite irrelevant to the matter with which he had to deal. . . . The case would stand over for fourteen days, with liberty to apply.

Note.

Immunity was subsequently waived by the U.S. Authorities. On the hearing of the case judgment was for the defendant.

[Reported in *The Times*, February 20, 1948]

COMPETENCE. FRANCO-BRITISH CONVENTION OF FEBRUARY 28, 1882. MOST-FAVOURED-NATION CLAUSE. JUDICIAL COMPETENCE. QUESTION FOREIGN TO THAT CONVENTION. CLAUSE INAPPLICABLE. ARTICLE 14 OF THE CIVIL CODE. COUNTERCLAIM IN FOREIGN COURT. BENEFIT FORFEITED

National Provincial Bank v. *Dollfus*

(Court of Appeal, Paris (Third Hall). July 9, 1947)

The Court . . . upon the appeal brought by the National Provincial Bank from a judgment of the Commercial Tribunal of the Seine (June 24, 1946), rejecting the objection raised by the appellant, declaring that the appellant had rightfully been made a party to an action before a French court. . . ;

Whereas the appellant seeks the reversal by the court of the decision below and a declaration that the Commercial Tribunal of the Seine had no competence to try the action brought by Mr. and Mrs. Dollfus for the reason that the official diplomatic interpretation of 1929 of the Franco-British treaty of 1882 conferred upon a British subject in France the right of claiming the advantage of most-favoured-nation treatment in any matter whatsoever;

Whereas, moreover, the respondents might be considered to have forfeited the advantage of Article 14 of the Civil Code, since, having been cited before the High Court of Justice in London, Mrs. Dollfus there entered appearance as counterclaimant, making no reservations, in order to seek substantially the same remedy;

Whereas, on the other hand, Mr. and Mrs. Dollfus seek confirmation of the judgment from which the appeal is brought;

Whereas, by the terms of Article 14 of the Civil Code, an alien, even though not resident in France, may be impleaded before a French court in respect of obligations towards a French national contracted abroad;

Whereas, on the other hand, according to the Franco-British convention of June 28, 1882, British subjects have the benefit of most-favoured-nation treatment;

Whereas, the National Provincial Bank invokes the said convention as well as the Franco-Belgian treaty of July 8, 1899, by virtue of which, in civil and commercial matters, French nationals in Belgium and Belgian nationals in France are subject to the same rules of judicial competence as nationals of those respective countries;

Whereas, the Bank would seek to deduce from these tests that the provisions of Article 14 of the Civil Code are no longer applicable

as against British subjects and that consequently the Commercial Tribunal of the Seine had no competence to try the case;

But whereas, on the other hand, the most-favoured-nation clause cannot be invoked unless the subject matter of the treaty which stipulates it is identical with that of the treaty of which the particular benefit is sought; and considering that in the Franco-British convention of 1882 the most-favoured-nation clause is not made applicable in any general sense but only in regard to the special matters therein enumerated; that this enumeration neither expressly nor impliedly embraces matters of judicial competence and procedure; that on May 21 and 29, 1929, other Franco-British agreements supervened upon which the National Provincial Bank places reliance; but that these new agreements, as well as the decree of June 16, 1933, as interpreted by the report to the President of the Republic accompanying it, had no other object than to ensure to British subjects in France and French nationals in Great Britain the benefit of the rent laws, their effect being strictly limited to this special object; that consequently, the Franco-British convention of 1882, not being relevant to questions of competence and procedure, cannot permit a British subject, by application of the most-favoured-nation clause, to claim the benefit of a treaty entered into between France and another foreign country in respect of these matters;

Whereas, however, Article 14 of the Civil Code does not relate to Public Policy [1]; that it constitutes in favour of French nationals a privilege of jurisdiction which they may at any time expressly or impliedly renounce.

Now, considering that having been impleaded by the National Provincial Bank before the High Court of Justice, King's Bench Division, in London, in respect of a claim for payment of sums of money owing by her to the bank, Mrs. Dollfus not merely admitted the competence of the English court, but also counterclaimed before the same court in order to obtain, on grounds of her incapacity, the restitution of all her assets held by the bank, an account of all sums received on her behalf by the National Provincial Bank and the payment of sums due to her on this account; that in making, with no reserve of any kind, this claim, which had the same object and was founded on the same arguments as the claim previously made by her before the Commercial Tribunal of the Seine, Mrs. Dollfus impliedly but none the less necessarily renounced the benefit of Article 14 of the Civil Code; that there is all the less reason to doubt this inasmuch as Mrs. Dollfus, at the time she

[1] Ordre public.

made her claim, knew that the National Provincial Bank had raised the objection before the Commercial Tribunal of the Seine of the lack of competence of the French court;

Allows the appeal of the National Provincial Bank, and declares that the Commercial Tribunal of the Seine had no competence to hear the claim of Mr. and Mrs. Dollfus.

Note.—This decision, in respect of the application of the most-favoured-nation clause, follows the judgment of the Cour de Cassation, Civil Chamber, December 22, 1913, and the ruling of the Chambre des Requêtes of March 10, 1941 (*Gazette du Palais*, May 3, 1941).

BOOK REVIEWS

Annual Digest and Reports of Public International Law Cases. Years 1919–1942 (Supplementary Volume). Edited by H. Lauterpacht. [Butterworths. 1947. xxvi and 550 pp. 55s.]

The ten volumes of the *Annual Digest* which have appeared hitherto, covering the years 1919–1942, are well established as a reference work which is indispensable to all those concerned with the study or practice of public international law. Professor Lauterpacht, who has been associated with the *Annual Digest* from its inception and is the sole editor of the last six volumes, has laid the international lawyer still further under his debt by the publication of this Supplementary Volume, which completes the series up to the end of 1942. The latest volume serves a double purpose: nearly half of it is devoted to tables and indices, and the remainder to reports of 171 cases, many with valuable annotations. There are three Consolidated Tables of Cases for the years 1919–1942, covering the ten volumes hitherto published : a Table of Cases reported, listed alphabetically; a Table of Cases reported, listed by tribunals and countries; and an alphabetical Table of Cases Cited. There is also a most valuable and full index to the ten volumes, extending to ninety-eight pages, which must comprise some 7,000 entries. A complete apparatus for reference is therefore now available to save the labour of tracing the subject under investigation through a number of volumes.

The cases reported in this supplementary volume fall into two groups: they comprise both reports of decisions during the years 1939–1942 from the municipal tribunals of the Continent which have now become available after the resumption of pre-war contacts; and some reports of earlier decisions which, for one reason or another, were omitted from the appropriate earlier volumes, but whose interest or importance justifies their inclusion in the *Digest*.

Among the older decisions now included, the large proportion of cases from the courts of the U. S. A. is particularly welcome to the English reader, to whom the vast and prolix American reports are sometimes forbidding territory. Of particular interest are two cases on the determination of water boundaries (Nos. 51 and 52). In the first of these, the Supreme Court in 1920 interpreted the doctrine of the *thalweg* as applicable to Upper and Lower St. Louis Bays; in the second, the Circuit Court of Appeals had to deal with the determination of questions affecting the boundary between Texas and Mexico, where it is formed by the Rio Grande. Of great interest, too, are seven cases (Nos. 60–66) dealing with the

controversial question of jurisdiction over civil claims arising on board foreign vessels in United States ports, a question in which the practice of the American courts has not been uniform. Also of particular interest among these decisions is a judgment of the Supreme Court of Kansas in 1926 (No. 132) on the effect of war upon treaties between belligerents.

Nearer home, two Scottish decisions reported deserve to be better known : In one case, the Sheriff's Court of Aberdeen (No. 50, *Watson* v. *R. C. A. Victor Company Inc.*, 1934) after deciding that a seaplane was not a ship, within s. 742 of the Merchant Shipping Act, 1894, proceeded to lay down the principles upon which, in accordance with s. 11 of the Air Navigation Act, 1920, the rules of salvage reward can be applied to the salvage of property from wrecked aircraft—the only decision on this subject, so far as is known. In the other case, the Court of Session, Outer House, in 1921 (Case No. 80), following the decision in *The Porto Alexandre*, held that immunity from jurisdiction applied to a vessel owned by the United States Shipping Board (the *Victoria*). English decisions are naturally few in this volume, but one, unreported elsewhere is of special value, a judgment of Cassels, J. on the interpretation of the Allied Forces Act, 1940 (No. 85, *R.* v. *Navratil*).

Possibly greater interest for the English reader attaches to the generous selection of decisions of Continental courts during the years 1939–1942, because reports of such decisions are not readily accessible and are therefore likely to be overlooked. Moreover, many of the reports are from private sources. A number of decisions deal with the interpretation by the courts of Sweden, France and Holland of confiscatory and discriminatory decrees and with the extent to which they are recognised by these courts. (See for example, Nos. 57, and 7–16). There are also interesting groups of decisions of great importance to any student of the subjects on the nature and effect of the occupation of enemy territory (Nos. 149–166); on the extent of the jurisdiction of Prize Courts, the effect of belligerent capture and the conception of absolute and conditional contraband.

C. J. C.

The Anatomy of Peace. By EMERY REVES. [George Allen & Unwin. 1946. 12s. 6d.]

THIS book when first published in America had an enormous sale. It has since been translated and published in many countries. Those were days when it appeared that the Second World War of 1939–1945 was ending, and when the discussions that were to lead to the formation of the United Nations as an organisation, with its associated bodies, were taking place. It is of interest to consider

the book's thesis and its treatment by its lively author at the present time. The book is uneven; its style somewhat hectic; statements are made of the sort that are usually termed 'challenging'—often a synonym for 'inaccurate'! What is one to make of a sentence such as this (at p. 129)? 'Peace is law. Peace is order. Peace is government.' Or (at p. 105 in author's italics for emphasis), 'War takes place whenever and wherever non-integrated social units of equal sovereignty come into contact.' The statement is far too wide; and quite untrue. If it were true, the world would be in a perpetual state of widespread wars, and Pax Victoriana would not have occurred.

The diagnosis of our maladies is extreme in expression, for in his attack on the sovereign State, the author appears to see no good in it at all; whereas all the material triumphs of civilisation with the conquests of disease, much curtailment of poverty, starvation, and ignorance, and the facilities now open for speedy communication of all sorts have been achieved despite, and frequently and definitely because of, the existence of sovereign States. However, when all criticism has been made, the central thesis is true and important. Complete State sovereignty must go! This is no new discovery. Socrates said, 'When you are asked your country, never reply 'I am an Athenian' or 'I am a Corinthian'—but 'I am a citizen of the world'. His reward was hemlock. And Confucius had the famous motto 'Under Heaven one Family'. But every generation—in this as in other things—needs truth to be reasserted in language that it can understand. And if hectic journalism alone will spread truth, then it must be so.

A great Englishman (Lord Hugh Cecil, as he was at the time) said during the First World War that 'the national State is the blood-stained Moloch of our time', and it is no less true today. Even the Atlantic Charter—a document that was cheered, adopted by forty-five separate States in 1942 and 1945, and then forgotten—spoke of the restoration of 'sovereign rights'. The history of the last three years has magnified the institution of sovereignity rather than curtailed it. And it is surely a matter for regret that the U.S.S.R. has so often appealed to national sentiments in supporting this outworn and disastrous idea. All the great States have done so alike; but those who were willing to hope that the U.S.S.R. might develop into 'a new civilisation' (in the phrase of the Webbs) must have been disappointed at many utterances which appear small-minded and petty-political rather than inspired by that world magnanimity which a creed which aspires to world acceptance should exemplify and proclaim. It is one of the tragedies of the seclusion of Russia that students of constitutional forms are unable freely to learn the means whereby the nations beyond the Iron (or the Gold!) Curtain adjust their inter-relations. Occidental disbelievers speak darkly of tyranny as being the sole

unifying force. It may be so, it may not be so; but only freedom of investigation, information, and speech can establish the truth. And if the Communist Commonwealth has a constitutional secret, all the world should be able to share it; and if it be a great and valuable secret, it will win in the end.

The practical proposals of our author are very sketchy, being contained in two or three pages at the end of the book. Indeed, they are really contained in a few sentences referring to the ' stages ' on the ' way to the goal ' (p. 246). (1) The conception of the idea; (2) the spread of the doctrine; (3) the ' election ' of representatives with ' power to put into practice the new principles '; (4) these ' elected delegates ' are to ' debate problems, to fight out details, and to arrive at (probably compromise) solutions '; (5) ' developments will then start in the right direction '. Such phraseology is exasperating in its woolly vagueness. Elihu Burritt, the ' learned blacksmith ', a century ago, used to gird at his contemporaries for their ' rag-worship ? '—that is, their delight in national emblems. Today we need to gird at ' word-worship '. It is of no use to say ' Law, Law ', or ' Democracy, Democracy ', unless we know and make plain what we mean. Lawyers must join in this great debate. Precision without verbiage, is sorely needed. Let us have a draft World Constitution, and let it give due place to justice and judicature, and then we may get somewhere !

The habits of the past; the interests, conceit, and childish passions of politicians, men at arms, and men of business; the hesitant indecisiveness of lawyers; the faithless timidity of men of religion, are fearsome obstacles. But there can be no doubt that national sovereignty is a conception that must be transcended in an increasing degree before lasting peace will come. And those who still cling to this conception should realise, above all, that there is no such threat to their beloved sovereign rights as war itself. The rulings of any International Court, or Council, or Parliament cannot interfere more with essential national sovereign rights than war. In times of so-called peace, the nation-state is compelled wildly to waste its substance on preparation; when the fighting starts, collective as well as individual freedom vanishes; wealth of spirit, mind, and body is dissipated incontinently; the bright hopes of the generation are blasted or destroyed. And when it is over, the vanquished entirely, and the ' victors ' in large degree, have lost the sovereign freedom they fain would have, and sought to maintain. Voilà l'ennemi ! L'ennemi n'est pas l'ennemi. L'ennemi c'est la guerre !

War is the ' ultima ratio ' between sovereign States. It will remain the ultimate arbitrament until some other form of arbitrament is devised, established, maintained, and respected.

W. HARVEY MOORE.

An Introduction to International Law. By J. G. Starke, B.A., LL.B., B.C.L.(oxon). [Butterworth & Co., Ltd. 1947. xiv and 218 pp. 25s.]

This is an excellent little book, written with extreme clarity and striking a practical note throughout. The reader acquainted with other elementary textbooks on international law will be immediately struck by the small space that has been allotted to the treatment of War and Neutrality. The author offers a double justification for this, claiming that 'a substantial portion of the rules usually discussed under these headings concern municipal law rather than international law' (Preface) and furthermore that 'by far the greater part of international law is not concerned at all with issues of peace or war'' (p. 5). Whatever may be the facts in relation to the first contention it is good that a popular misconception should receive so direct a correction from the second.

Questions of 'Disputes, War and Neutrality' are treated in some fifty pages in the last part (V) of the book so that the principles they demonstrate and the considerations they evoke are, as it were, superimposed upon the general pattern of international law laid out in the major portion of the work. This is a well conceived arrangement and it materially assists the author's main purpose of providing a practical introduction to the day-to-day problems of international law that are likely to confront international officials and diplomats. These problems turn, of course, mainly around the law and practice in regard to treaties and the author is to be congratulated on the succinct treatment of this subject embodied in Part IV, 'International Transactions'.

If one subject may be singled out as a test of the treatment by any author of a general study of international law, such a subject is Recognition, for, as Mr. Starke himself says, 'there is a deceptive simplicity about this matter of recognition' . . . which 'is one of the most difficult branches of international law, not merely from the point of view of exposition of principles, but also intrinsically by reason of the many difficult questions which continually arise in practice' (p. 72). As one of the two main reasons for the difficulty the author advances the suggestion that 'recognition is, as the practice of most States shows, much more a question of policy than of law'. This is a somewhat bold simplification, of a kind perhaps inevitable in an elementary work, and the author has felt constrained to cite in its support no less an authority than Professor H. A. Smith (at pp. 77–80 of 'Great Britain and the Law of Nations', Vol. 1). He concludes the same paragraph, however, in milder terms: '. . . there is an irresistible tendency of recognising States to use legal principles as a convenient camouflage for political decisions, with the result that the line between politics and law is not drawn very distinctly'. The last clause

may be read in mitigation of the earlier statement, and as giving a more balanced view, applicable, incidentally, not merely to the subject of recognition but to international law as a whole. How much is law and how much is policy in the practice of Recognition as so far developed is a matter of assessment of the facts of international history, which assessment is inevitably open to considerable subjective influence. Many will agree with Mr. Starke. Nevertheless, a lawyer must clearly draw a line somewhere, beyond which legal principle may not be further adapted as a 'convenient camouflage' for policy and still remain law. It may also be recorded that a very powerful claim for the preponderance of law over policy in the field of Recognition has recently been made by Professor Lauterpacht in his treatise on the subject in the series 'Cambridge Studies in International and Comparative Law'.

Lest the foregoing should be taken to imply a general criticism let it be said that the author has preserved a truly admirable balance of emphasis through the work as a whole. He has achieved clarity and simplicity without sacrificing the deeper appreciation that the subject demands.

E. H. WALL.

A Text-Book of International Law. By Professor ALF ROSS. With a Foreword by Professor J. L. BRIERLY. [London: Longmans. 1947. 313 pp. 21s.]

PROFESSOR ROSS is well known on the Continent for his writings on conceptual jurisprudence and he has sought in his new book to bring his socio-psychological approach to bear on the problems of international law. His book, however, is wrongly titled, for *A Text-Book of International Law* should be a work for students, particularly those at the undergraduate stage. Professor Ross's book, however, is not a work of this sort.

However much we might like to say that the law of war has receded in importance and the law of peace replaced it, it is a little too early for textbooks to dispense with the subject entirely, and particularly is this so with books written after the delivery of the Nuremberg Judgment and its comments on the Kellogg Pact. International law is becoming more and more concerned with international institutions, their purposes, and the law governing them, but in this textbook there is very little mention of this rich field of legal research and activity. The I.L.O. is dealt with in less than a page, and nowhere is there any mention of UNRRA or Bretton Woods, while, although occasional reference is made to the United Nations and its Council and Assembly, there is no discussion of the League of Nations or of UNO.

It is true that a work devoted to international law as practised today need not pay a great deal of attention to history, but

Professor Ross's book is not particularly devoted to practice—few treaties or diplomatic incidents are mentioned and only some thirty cases are named and any textbook of international law, if it is to be of value as such, must give some account of the historical background of the subject. Similarly, one cannot help feeling that *A Text-Book of International Law* should provide some analysis of the problem of mandated territories, which, from the practical point of view, is far more important than informing the student that the Roman Catholic Church and the Vatican State are both subjects of international law, and that the Vatican State ' stands in a relation of vassalage to the Roman Church ' (pp. 103–4).

The research student in jurisprudence may be extremely interested in the reasons why private international law should really be called ' interlegal law ' (p. 73), and why the traditional definition of international law as a law between States should really be a law between ' self-governing communities ' (p. 17)—although apparently international institutions are not within this category—but it is difficult to see what purpose such philosophical discussion serves in a textbook of international law.

As with so many recent works intended to prove a personal thesis, the book presents numerous examples of reasoning *non sequitur*. Not everyone will agree that because there have been ' numerous judgments concerning relations between the member States of the United States of America in which the decision was, subsidiarily, based on the general rules of International Law ', therefore ' this establishes that the States are subjects of international law ' (pp. 100–1). This leads the learned writer to assert, in another place, that the liability of the federal State for a wrong committed by the member State is really vicarious, although this is not so if the wrongdoer is merely a municipality, for then the liability is direct (p. 259). A similar example of debatable reasoning arises in connection with the chapter on recognition; for here we learn that ' in conformity with the claims of humanity the idea seems to have gained ground . . . that insurgents cannot be regarded as a gang of criminals who are each of them separately responsible under the criminal law, but that the responsibility must be placed collectively on the organised group, in principle on the analogy of the international legal rules concerning war. This is enough to prove that the insurgent party is *ipso jure* a subject of International Law ' (pp. 124–5). State practice during civil wars and other insurrections does not seem to support this view, as can be seen, for example, in the case of the Indian National Army.

The latter section of this book is devoted to the problems of State responsibility and the settlement of State differences. In connection with the former, there is a long discussion on *culpa*, but no reference to the importance on this point of the *Alabama* Arbitration. As regards the judicial settlement of international disputes, Professor Ross retains the concept of justiciable as distinct

from non-justiciable issues, and of the jurisdiction of the International Court of Justice he informs us, at page 278, that Article 36 of its Statute 'limits the normal competence of the court to certain specified legal disputes', while later, at page 295, we learn that 'no limit has been set to the nature of the disputes which can be referred to the settlement of the court. Purely political disputes too can be submitted'.

In the light of the author's philosophical writing, one cannot but endorse his comment about Knubben on sovereignty:—'The rest of us . . . permit ourselves to doubt disrespectfully, like the child in 'The Emperor's New Clothes', whether there is anything but quite ordinary nonsense behind all this solemnity' (p. 34, n. 1).

L. C. GREEN.

Rediscovery of Justice. By F. R. BIENENFELD, DR.JUR. [London: George Allen & Unwin, Ltd. 1947. 263 pp. 15s. net.]

DR. BIENENFELD'S lucid and stimulating book sheds fresh light on a problem of vital importance. The natural rights of man have their roots in eternal impulses which, although contradictory, all claim to be 'just'. What then is Justice?

The author's approach to the problem is original. His inquiry begins in the simplest of all communities, the nursery, and the parallelism between nursery and society remains the key-note of the book. Observation of the nursery world reveals that every child puts forward five 'demands for Justice': he desires to do what he likes, to keep his possessions and privileges, to receive no less than his brothers and sisters, to be rewarded for his endeavours and achievements and to be better treated than outsiders. Are these demands not clearly identical with the great postulates which under the names of Liberalism, Conservatism, Communism, Socialism and Nationalism strive like Titans for the mastery of the universe? Dr. Bienenfeld believes that the method employed by the parents who maintain peace and order in the nursery by furthering, in accordance with the varying exigencies of the moment, now one now the other of the eternal demands, supplies a useful lesson for the functioning of justice in society.

To the principles of Conservatism, Liberalism, Socialism and Communism in the relations between subjects correspond the conceptions of Autocracy, Individualism, Self-Determination and Social Co-operation in the relations between subjects and ruler. In a searching analysis Dr. Bienenfeld shows that the hegemony of one principle and the tendency to regard its exclusive application as Justice makes stability impossible and causes tension and revolution. It is the function of Justice, he writes, 'to maintain order between subjects with the minimum of force by allowing scope to

each of the contradictory social demands with impartiality according to the needs of the moment and to the varying desires of the governed' (p. 27). The equilibrium achieved at a given moment is by no means immutable. Readjustment becomes necessary with changing social and spiritual conditions. Dr. Bienenfeld denies the existence of an eternally valid Natural Law.

The author shows in great detail how the balance between the eternal social demands is achieved in a twofold manner: first, by allotting to each principle specific fields of human activities, *e.g.*, to the Individualistic principle the field of religion, art and science, the press and public speech, to the Autocratic conception the domain of military organisation, to the principle of Social Co-operation the section of political and constitutional organisation, and so on; secondly, by preventing any one principle from becoming the unrestricted ruler of its sphere. Even in its own domain each social demand must allow some scope to the other demands. In this connection the reviewer ventures to point out that the role allotted by the author to the principle of Self-Determination in the field of Education seems rather too exclusive. The development of the individual's gifts and abilities is no doubt one of the aims of Education but his preparation for the part he is to play in the political system is another. If a political system based on democracy is to prove workable, Social Co-operation must be allowed some scope in the field of Education. Agreement on fundamentals must be achieved in the schools before it can be attained in Parliament. Education must further the spirit of compromise essential for the success of democracy. The unrestricted rule of the principle of Self-Determination in the French educational system with its division into lay and religious schools has undoubtedly contributed to the perpetuation of the 'deux Frances' and the instability of the French political system.

The last part of Dr. Bienenfeld's book tries to give an answer to the question whether there is in our era a universally accepted Natural Law and makes suggestions for the framing of a Minimum Bill of Rights. It does not detract from the value of Dr. Bienenfeld's book that the points on which agreement seems at present possible are few.

A. Weinreb.

A Modern Law of Nations—An Introduction. By Philip C. Jessup. [The Macmillan Company, New York. 1948. viii and 236 pp. $4.00.]

This is a book that points the way. The author, who is Hamilton Fish Professor of International Law and Diplomacy at Columbia University and an editor of the *American Journal of International Law*, has, of course, an established reputation in the international

field, and a contribution from his pen to the present discussion of the future of International Law must command attention.

If International Law is to serve adequately the needs of the modern world it must, the author suggests, be made directly applicable to individuals as well as to States, and it must be conceived as serving the community interest of nations that are *inter-dependent* rather than independent or competing. It follows, amongst other things, that long standing conceptions of national sovereignty must undergo modification in the light of the new dominant community interest.

Clearly, however, the nations of the world may be inter-dependent in two senses. They may be inter-dependent in the sense that in the last analysis conditions of geography, climate, disposition of raw materials, numerical population, capacity for productive labour and so forth, make self-dependence or independence an impossible or a self-destructive mode of life on the part of a nation, or in the sense that these elements in the world situation are both recognised as facts by the nations of the world and acted upon so as to produce real inter-dependence in practice. It is from inter-dependence in the former sense that the community interest which the author postulates, ultimately derives. But in so far as law results from behaviour and custom it would seem that the extent to which the developments in the law of nations that he desires to see brought about are realisable in practice will depend in direct ratio on the extent to which international behaviour becomes inter-dependent in the second sense.

This is not to condemn the author's thesis as fanciful. On the contrary, its very excellence—for excellent it is—lies precisely in this, that the author takes international law as he finds it, and starting with so much of it as is real in practice he indicates the degree in which it must move forward in the immediate future in order to meet the requirements of that degree of practical inter-dependence to which the nations have attained. Though his ultimate goal lies beyond, the author does not overreach himself. He is on firmer ground, however, in treating of the position of individuals at international law than in considering the relations of States, for with the records of the war criminals trials before us and the incipient international legal protection of individual human rights there is more positive achievement to indicate.

The book makes no attempt to cover the whole field of international law; only 'those principles and rules have been included which seemed to offer the most fruitful fields for testing the hypotheses upon which the work proceeds'. Perhaps the most illuminating tests are provided in Chapter 5, devoted to the 'Responsibility of States for Injuries to Individuals', which title expresses the necessary change in treatment of the conventional topic of 'the responsibility of States for injuries to aliens'—one of the most highly developed branches of international law—that

results from the embodiment in international law of the principle of the duty to respect the rights of man. The whole is a most valuable contribution to a subject of the very greatest importance.

E. H. W.

Atti della Reale Accademia Peloritana (*Classe di Scienze Giuridiche*), 1944

The fifth number of the new series of the Atti della Reale Accademia Peloritana contains articles of deep erudition and originality. From the jurisprudential standpoint, Dr. R. De Stefano's contribution on 'Natural Law and Social Law' and A. Attisani's article on 'Decorum and Justum' deserve a close study by all those who are interested in the radical problem of the relationship between Law and Morality. Thomasius who may be considered as the first legal philosopher, distinguished between 'honestum', 'iustum' and 'decorum', while later writers devoted their attention solely to the distinction between 'iustum' and 'honestum', which is indeed familiar to all students of Jurisprudence, or, according to the Continental designation, Philosophy of Law. Mr. Attisani develops his subject with a view to showing the necessity of retaining Thomasius' original trichotomy which included the notion of 'decorum'.

Guido Basile, in his article on the 'Prevention and Repression of Crime', gives a very comprehensive description of the English and American attitude towards juvenile delinquency and the attempts which have been made to improve Italian law in this respect. He then discusses the underlying spirit of the modern tendency of setting up regular systems intended to prevent crime among youngsters.

Professor Arturo Carlo Jemolo contributes two articles: one on 'The Jurist and Politics' and the other on 'The Sources of Law operating in Italy'. In his first article his main contention—no doubt a perfectly correct one—is that the jurist is in a better position to find out the real significance of a legislative enactment and to judge whether a particular move amounts to a departure from the declared policy of the Government. He emphasises in his conclusion, the gist of his reasoning: 'All political ideals may be defended but what cannot be defended . . . is the contrast between what is proclaimed and what is done . . . One may defend liberalism or protectionism . . . but not the Government which adopts as its model the first and in reality follows the second. Therefore, expert advice may avoid irreparable governmental errors'. The second article is of particular interest to international lawyers. The writer is definitely of the opinion that the Military Authorities of the Allied Governments were entitled to issue orders in Italy provided they conformed strictly to the limitations imposed

by International Law. With regard to the orders emanating from the German Military Authorities in Northern Italy, the writer says that the Royal Italian Government might possibly be considered as bound by its own declaration of war against Germany and therefore the German Army would be in the position of a hostile army occupying part of Italy. As to the acts of the Italian Republican Government, the author concludes that the Royal Italian Government was entitled to ignore these acts, as the Fascist Republican Government had not effectively succeeded in imposing its regime and did not have a recognised *de jure* existence.

It is earnestly hoped that the Accademia Peloritana will again resume its normal activities by keeping alive the age-long traditions of Italian legal literature.

J. M. GANADO.

SELECTED OFFICIAL DOCUMENTS

The following three documents are printed in the present issue:

1. Extracts from the Havana Charter for an International Trade Organisation, March 24, 1948.
2. Convention on the Inter-governmental Maritime Consultative Organisation, March 6, 1948 (Cmd. 7412).
3. Resolution No. 1 of the Freedom of Information Conference, Geneva, April, 1948.

1. An attempt has been made to extract sufficient from the Havana Charter for an International Trade Organisation to indicate the nature and scope of the provisions of the Charter. In reality the whole document is an interwoven web, but in view of the fact that the document is too long to be printed in full in the *Quarterly*, many paragraphs and articles have been omitted which provide for consultation and other action by the Organisation and its Members. The thread of consultation, negotiation and co-operation in fact runs throughout the whole Charter. The final act of the United Nations Conference on Trade and Employment held at Havana from November, 1947, to March, 1948, has been printed as a United Nations publication and can be obtained in the United Kingdom from H.M. Stationery Office.

2. It may be of interest to readers to study the Convention of the Inter-governmental Maritime Consultative Organisation together with the ITO Charter. This Convention was being drafted in Geneva at the same time as the later stages of the Havana Conference. The purposes of this Organisation fall in part within the field generally assigned to the International Trade Organisation, but they are also partly technical in character. There is, moreover, no intention that the work of IMCO should impinge on the field of work of bodies such as the Comité Maritime International, which was described in an article by Sir Leslie Scott and Mr. Cyril Miller in Vol. 1, No. 4, of this journal. The IMCO Convention has some interesting features: in particular one may note Part XIII, which is the first provision in a Constitution of a Specialised Agency following the adoption by the General Assembly of the United Nations on November 21, 1947, of a general convention on the Privileges and Immunities of Specialised Agencies. The procedure for amendment under Part XIV is also interesting, if a little complicated. It enables a member of the Organisation to be expelled if the member refuses to accept an amendment to the Convention

which is considered of sufficient importance to justify expulsion. IMCO and ITO are the youngest and possibly the last of the Specialised Agencies. Although the Organisations themselves are not yet in existence, ITO has an interim commission and IMCO has a preparatory commission. Both commissions have been set up by resolution of the conferences which prepared the Constitutions of the Organisations.

3. The United Nations Conference on Freedom of Information met at Geneva during March and April. The conclusions of the Conference were formulated in a number of resolutions and three draft international conventions. The latter comprise (i) a draft convention on the gathering and international transmission of news which seeks to obtain the maximum freedom for newsmen and information agencies in the pursuit of their business; (ii) a draft convention concerning the institution of an international right of correction roughly similar to the right of reply which already exists in the domestic laws of many States; and (iii) a draft convention on freedom of information by which States would undertake to grant to their own nationals and to the nationals of other Contracting States freedom to seek, receive and impart information subject only to certain generally recognised safeguards in the interests of national security, protection of reputation and property, and such like. The Conference requested the Economic and Social Council to revise these drafts at its next session in the light of comments received in the meantime from Governments, and it is intended that the revised texts shall be opened for signature during the Third Session of the General Assembly. The Resolution printed in the present number expresses the views of the Conference on general principles. It was adopted by thirty-four votes to six, the Eastern European States voting against it.

1

HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANISATION

CHAPTER I

PURPOSE AND OBJECTIVES

ARTICLE 1

RECOGNISING the determination of the United Nations to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations,

THE PARTIES to this Charter undertake in the fields of trade and employment to co-operate with one another and with the United Nations

For the Purpose of

REALISING the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter.

TO THIS END they pledge themselves, individually and collectively, to promote national and international action designed to attain the following objectives :

1. To assure a large and steadily growing volume of real income and effective demand, to increase the production, consumption and exchange of goods, and thus to contribute to a balanced and expanding world economy.

2. To foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment.

3. To further the enjoyment by all countries, on equal terms, of access to the markets, products and productive facilities which are needed for their economic prosperity and development.

4. To promote on a reciprocal and mutually advantageous basis the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce.

5. To enable countries, by increasing the opportunities for their trade and economic development, to abstain from measures which would disrupt world commerce, reduce productive employment or retard economic progress.

6. To facilitate through the promotion of mutual understanding, consultation and co-operation the solution of problems relating to international trade in the fields of employment, economic development, commercial policy, business practices and commodity policy.

ACCORDINGLY they hereby establish the INTERNATIONAL TRADE ORGANISATION through which they shall co-operate as Members to achieve the purpose and the objectives set forth in this Article.

CHAPTER II

EMPLOYMENT AND ECONOMIC ACTIVITY

ARTICLE 2

Importance of Employment, Production and Demand in relation to the Purpose of this Charter

1. The Members recognise that the avoidance of unemployment or underemployment, through the achievement and maintenance in

each country of useful employment opportunities for those able and willing to work and of a large and steadily growing volume of production and effective demand for goods and services, is not of domestic concern alone, but is also a necessary condition for the achievement of the general purpose and the objectives set forth in Article 1, including the expansion of international trade, and thus for the well-being of all other countries.

2. The Members recognise that, while the avoidance of unemployment or underemployment must depend primarily on internal measures taken by individual countries, such measures should be supplemented by concerted action under the sponsorship of the Economic and Social Council of the United Nations in collaboration with the appropriate inter-governmental organisations, each of these bodies acting within its respective sphere and consistently with the terms and purposes of its basic instrument.

3. The Members recognise that the regular exchange of information and views among Members is indispensable for successful co-operation in the field of employment and economic activity and should be facilitated by the Organisation.

ARTICLE 3

Maintenance of Domestic Employment

ARTICLE 4

Removal of Maladjustments within the Balance of Payments

ARTICLE 5

Exchange of Information and Consultation

ARTICLE 6

Safeguards for Members subject to External Inflationary or Deflationary Pressure

ARTICLE 7

Fair Labour Standards

1. The Members recognise that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognise that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognise that unfair labour conditions, particularly in production for export,

create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

2. Members which are also members of the International Labour Organisation shall co-operate with that organisation in giving effect to this undertaking.

3. In all matters relating to labour standards that may be referred to the Organisation in accordance with the provisions of Articles 94 or 95, it shall consult and co-operate with the International Labour Organisation.

CHAPTER III

ECONOMIC DEVELOPMENT AND RECONSTRUCTION

Article 8

Importance of Economic Development and Reconstruction in Relation to the Purpose of this Charter

The Members recognise that the productive use of the world's human and material resources is of concern to and will benefit all countries, and that the industrial and general economic development of all countries, particularly of those in which resources are as yet relatively undeveloped, as well as the reconstruction of those countries whose economies have been devastated by war, will improve opportunities for employment, enhance the productivity of labour, increase the demand for goods and services, contribute to economic balance, expand international trade and raise levels of real income.

Article 9

Development of Domestic Resources and Productivity

Members shall within their respective territories take action designed progressively to develop, and where necessary to reconstruct, industrial and other economic resources and to raise standards of productivity through measures not inconsistent with the other provisions of this Charter.

Article 10

Co-operation for Economic Development and Reconstruction

1. Members shall co-operate with one another, with the Economic and Social Council of the United Nations, with the Organisation and with other appropriate inter-governmental organisations, in

facilitating and promoting industrial and general economic development, as well as the reconstruction of those countries whose economies have been devastated by war.

ARTICLE 11

Means of Promoting Economic Development and Reconstruction

1. Progressive industrial and general economic development, as well as reconstruction, requires among other things adequate supplies of capital funds, materials, modern equipment and technology and technical and managerial skills. Accordingly, in order to stimulate and assist in the provision and exchange of these facilities :

(*a*) Members shall co-operate, in accordance with Article 10, in providing or arranging for the provision of such facilities within the limits of their power, and Members shall not impose unreasonable or unjustifiable impediments that would prevent other Members from obtaining on equitable terms any such facilities for their economic development or, in the case of Member countries whose economies have been devastated by war, for their reconstruction;

(*b*) no Member shall take unreasonable or unjustifiable action within its territory injurious to the rights or interests of nationals of other Members in the enterprise, skills, capital, arts or technology which they have supplied.

ARTICLE 12

International Investment for Economic Development and Reconstruction

1. The Members recognise that :

(*c*) without prejudice to existing international agreements to which Members are parties, a Member has the right :

(i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies;

(ii) to determine whether and to what extent and upon what terms it will allow future foreign investment;

(iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments;

(iv) to prescribe and give effect to other reasonable requirements with respect to existing and future investments;

2. Members therefore undertake :

(*a*) subject to the provisions of paragraph 1 (*c*) and to any agreements entered into under paragraph 1 (*d*),

(i) to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments, and

(ii) to give due regard to the desirability of avoiding discrimination as between foreign investments;

(*b*) upon the request of any Member and without prejudice to existing international agreements to which Members are parties, to enter into consultation or to participate in negotiations directed to the conclusion, if mutually acceptable, of an agreement of the kind referred to in paragraph 1 (*d*).

3. Members shall promote co-operation between national and foreign enterprises or investors for the purpose of fostering economic development or reconstruction in cases where such co-operation appears to the Members concerned to be appropriate.

ARTICLE 13

Governmental Assistance to Economic Development and Reconstruction

ARTICLE 14

Transitional Measures

ARTICLE 15

Preferential Agreements for Economic Development and Reconstruction

1. The Members recognise that special circumstances, including the need for economic development or reconstruction, may justify new preferential agreements between two or more countries in the interest of the programmes of economic development or reconstruction of one or more of them.

2. Any Member contemplating the conclusion of such an agreement shall communicate its intention to the Organisation and provide it with the relevant information to enable it to examine the proposed agreement. The Organisation shall promptly communicate such information to all Members.

3. The Organisation shall examine the proposal and, by a two-thirds majority of the Members present and voting, may grant, subject to such conditions as it may impose, an exception to the provisions of Article 16 to permit the proposed agreement to become effective.

4. Notwithstanding the provisions of paragraph 3, the Organisation shall authorise, in accordance with the provisions of paragraphs

5 and 6, the necessary departure from the provisions of Article 16 in respect of a proposed agreement between Members for the establishment of tariff preferences which it determines to fulfil the following conditions and requirements :

(*a*) the territories of the parties to the agreement are contiguous one with another, or all parties belong to the same economic region;

(*b*) any preference provided for in the agreement is necessary to ensure a sound and adequate market for a particular industry or branch of agriculture which is being, or is to be, created or reconstructed or substantially developed or substantially modernised;

(*c*) the parties to the agreement undertake to grant free entry for the products of the industry or branch of agriculture referred to in sub-paragraph (*b*) or to apply customs duties to such products sufficiently low to ensure that the objectives set forth in that sub-paragraph will be achieved;

(*d*) any compensation granted to the other parties by the party receiving preferential treatment shall, if it is a preferential concession, conform with the provisions of this paragraph;

(*e*) the agreement contains provisions permitting, on terms and conditions to be determined by negotiations with the parties to the agreement, the adherence of other Members which are able to qualify as parties to the agreement under the provisions of this paragraph, in the interest of their programmes of economic development or reconstruction. The provisions of Chapter VIII may be invoked by such a Member in this respect only on the ground that it has been unjustifiably excluded from participation in such an agreement;

(*f*) the agreement contains provisions for its termination within a period necessary for the fulfilment of its purposes but, in any case, not later than at the end of ten years; any renewal shall be subject to the approval of the Organisation and no renewal shall be for a longer period than five years.

5. When the Organisation, upon the application of a Member and in accordance with the provisions of paragraph 6, approves a margin of preference as an exception to Article 16 in respect of the products covered by the proposed agreement, it may, as a condition of its approval, require a reduction in an unbound most-favoured-nation rate of duty proposed by the Member in respect of any product so covered, if in the light of the representations of any affected Member it considers that rate excessive.

6. (*a*) If the Organisation finds that the proposed agreement fulfils the conditions and requirements set forth in paragraph 4 and that the conclusion of the agreement is not likely to cause substantial injury to the external trade of a Member country not party to the agreement, it shall within two months authorise the

parties to the agreement to depart from the provisions of Article 16, as regards the products covered by the agreement. If the Organisation does not give a ruling within the specified period, its authorisation shall be regarded as having been automatically granted.

(*b*) If the Organisation finds that the proposed agreement, while fulfilling the conditions and requirements set forth in paragraph 4, is likely to cause substantial injury to the external trade of a Member country not party to the agreement, it shall inform interested Members of its findings and shall require the Members contemplating the conclusion of the agreement to enter into negotiations with that Member. When agreement is reached in the negotiations, the Organisation shall authorise the Members contemplating the conclusion of the preferential agreement to depart from the provisions of Article 16 as regards the products covered by the preferential agreement. If, at the end of two months from the date on which the Organisation suggested such negotiations, the negotiations have not been completed and the Organisation considers that the injured Member is unreasonably preventing the conclusion of the negotiations, it shall authorise the necessary departure from the provisions of Article 16 and at the same time shall fix a fair compensation to be granted by the parties to the agreement to the injured Member or, if this is not possible or reasonable, prescribe such modification of the agreement as will give such Member fair treatment. The provisions of Chapter VIII may be invoked by such Member only if it does not accept the decision of the Organisation regarding such compensation.

(*c*) If the Organisation finds that the proposed agreement, while fulfilling the conditions and requirements set forth in paragraph 4, is likely to jeopardise the economic position of a Member in world trade, it shall not authorise any departure from the provisions of Article 16 unless the parties to the agreement have reached a mutually satisfactory understanding with that Member.

(*d*) If the Organisation finds that the prospective parties to a regional preferential agreement have, prior to November 21, 1947, obtained from countries representing at least two-thirds of their import trade the right to depart from most-favoured-nation treatment in the cases envisaged in the agreement, the Organisation shall, without prejudice to the conditions governing the recognition of such right, grant the authorisation provided for in paragraph 5 and in sub-paragraph (*a*) of this paragraph, provided that the conditions and requirements set out in sub-paragraphs (*a*), (*e*) and (*f*) of paragraph 4 are fulfilled. Nevertheless, if the Organisation finds that the external trade of one or more Member countries, which have not recognised this right to depart from most-favoured-nation treatment, is threatened with substantial injury, it shall invite the parties to the agreement to enter into negotiations with

the injured Member, and the provisions of sub-paragraph (*b*) of this paragraph shall apply.

CHAPTER IV

COMMERCIAL POLICY

SECTION A—TARIFFS, PREFERENCES, AND INTERNAL TAXATION AND REGULATION

ARTICLE 16

General Most-favoured-nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters within the scope of paragraphs 2 and 4 of Article 18, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for all other Member countries.

2. The provisions of paragraph 1 shall not require the elimination, except as provided in Article 17, of any preferences in respect of import duties or charges which do not exceed the margins provided for in paragraph 4 and which fall within the following descriptions :

(*a*) preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;

(*b*) preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C, D and E;

(*c*) preferences in force exclusively between the United States of America and the Republic of Cuba;

(*d*) preferences in force exclusively between the Republic of the Philippines and the United States of America, including the dependent territories of the latter;

(*e*) preferences in force exclusively between neighbouring countries listed in Annexes F, G, H, I and J.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences fulfil the applicable requirements of Article 15.

4. The margin of preference on any product in respect of which a preference is permitted under paragraph 2 shall not exceed (*a*) the maximum margin provided for under the General Agreement on Tariffs and Trade or any subsequent operative agreement resulting from negotiations under Article 17, or (*b*) if not provided for under such agreements, the margin existing either on April 10, 1947, or on any earlier date established for a Member as a basis for negotiating the General Agreement on Tariffs and Trade, at the option of such Member.

5. The imposition of a margin of tariff preference not in excess of the amount necessary to compensate for the elimination of a margin of preference in an internal tax existing on April 10, 1947, exclusively between two or more of the territories in respect of which preferential import duties or charges are permitted under paragraph 2, shall not be deemed to be contrary to the provisions of this Article, it being understood that any such margin of tariff preference shall be subject to the provisions of Article 17.

ARTICLE 17

Reduction of Tariffs and Elimination of Preferences

1. Each Member shall, upon the request of any other Member or Members, and subject to procedural arrangements established by the Organisation, enter into and carry out with such other Member or Members negotiations directed to the substantial reduction of the general levels of tariffs and other charges on imports and exports, and to the elimination of the preferences referred to in paragraph 2 of Article 16, on a reciprocal and mutually advantageous basis.

2. The negotiations provided for in paragraph 1 shall proceed in accordance with the following rules :

(*a*) Such negotiations shall be conducted on a selective product-by-product basis which will afford adequate opportunity to take into account the needs of individual countries and individual industries. Members shall be free not to grant concessions on particular products and, in the granting of a concession, they may reduce the duty, bind it at its then existing level, or undertake not to raise it above a specified higher level.

(*b*) No Member shall be required to grant unilateral concessions, or to grant concessions to other Members without receiving adequate concessions in return. Account shall be taken of the value to any Member of obtaining in its own right and by direct obligation the indirect concessions which it would otherwise enjoy only by virtue of Article 16.

(*c*) In negotiations relating to any specific product with respect to which a preference applies,

(i) when a reduction is negotiated only in the most-favoured-nation rate, such reduction shall operate automatically to reduce or eliminate the margin of preference applicable to that product;

(ii) when a reduction is negotiated only in the preferential rate, the most-favoured-nation rate shall automatically be reduced to the extent of such reduction;

(iii) when it is agreed that reductions will be negotiated in both the most-favoured-nation rate and the preferential rate, the reduction in each shall be that agreed by the parties to the negotiations;

(iv) no margin of preference shall be increased.

(*d*) The binding against increase of low duties or of duty-free treatment shall in principle be recognised as a concession equivalent in value to the substantial reduction of high duties or the elimination of tariff preferences.

(*e*) Prior international obligations shall not be invoked to frustrate the requirement under paragraph 1 to negotiate with respect to preferences, it being understood that agreements which result from such negotiations and which conflict with such obligations shall not require the modification or termination of such obligations except (i) with the consent of the parties to such obligations, or, in the absence of such consent, (ii) by modification or termination of such obligations in accordance with their terms.

3. The negotiations leading to the General Agreement on Tariffs and Trade, concluded at Geneva on October 30, 1947, shall be deemed to be negotiations pursuant to this Article. The concessions agreed upon as a result of all other negotiations completed by a Member pursuant to this Article shall be incorporated in the General Agreement on terms to be agreed with the parties thereto. If any Member enters into any agreement relating to tariffs or preferences which is not concluded pursuant to this Article, the negotiations leading to such agreement shall nevertheless conform to the requirements of paragraph 2 (*c*).

4. (*a*) The provisions of Article 16 shall not prevent the operation of paragraph 5 (*b*) of Article XXV of the General Agreement on Tariffs and Trade, as amended at the First Session of the CONTRACTING PARTIES.

(*b*) If a Member has failed to become a contracting party to the General Agreement within two years from the entry into force of this Charter with respect to such Member, the provisions of Article 16 shall cease to require, at the end of that period, the application to the trade of such Member country of the concessions granted, in the appropriate Schedule annexed to the General Agreement, by another Member which has requested the first Member to negotiate with a view to becoming a contracting party

to the General Agreement but has not successfully concluded negotiations; *Provided* that the Organisation may, by a majority of the votes cast, require the continued application of such concessions to the trade of any Member country which has been unreasonably prevented from becoming a contracting party to the General Agreement pursuant to negotiations in accordance with the provisions of this Article.

(*c*) If a Member which is a contracting party to the General Agreement proposes to withhold tariff concessions from the trade of a Member country which is not a contracting party, it shall give notice in writing to the Organisation and to the affected Member. The latter Member may request the Organisation to require the continuance of such concessions, and if such a request has been made the tariff concessions shall not be withheld pending a decision by the Organisation under the provisions of sub-paragraph (*b*) of this paragraph.

(*d*) In any determination whether a Member has been unreasonably prevented from becoming a contracting party to the General Agreement, and in any determination under the provisions of Chapter VIII whether a Member has failed without sufficient justification to fulfil its obligations under paragraph 1 of this Article, the Organisation shall have regard to all relevant circumstances, including the developmental, reconstruction and other needs, and the general fiscal structures, of the Member countries concerned and to the provisions of the Charter as a whole.

(*e*) If such concessions are in fact withheld, so as to result in the application to the trade of a Member country of duties higher than would otherwise have been applicable, such Member shall then be free, within sixty days after such an action becomes effective, to give written notice of withdrawal from the Organisation. The withdrawal shall become effective upon the expiration of sixty days from the day on which such notice is received by the Director-General.

Article 18

National Treatment on Internal Taxation and Regulation

1. The Members cognise that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of any Member country imported into any other Member country shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

Moreover, no Member shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2 but which is specifically authorised under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the Member imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of any Member country imported into any other Member country shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No Member shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no Member shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in any Member country on July 1, 1939, April 10, 1947, or on the date of this Charter, at the option of that Member; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be subject to negotiation and shall accordingly be treated as a customs duty for the purposes of Article 17.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (*a*) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(*b*) The provisions of this Article shall not prevent the payment

of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The Members recognise that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of Member countries supplying imported products. Accordingly, Members applying such measures shall take account of the interests of exporting Member countries with a view to avoiding to the fullest practicable extent such prejudicial effects.

Article 19

Special Provisions relating to Cinematograph Films

Section B—Quantitative Restrictions and Related Exchange Matters

Article 20

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of any other Member country or on the exportation or sale for export of any product destined for any other Member country.

2. The provisions of paragraph 1 shall not extend to the following :

(*a*) export prohibitions or restrictions applied for the period necessary to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member country;

(*b*) import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade; if, in the opinion of the Organisation, the standards or regulations adopted by a Member under this subparagraph have an unduly restrictive effect on trade, the Organisation may request the Member to revise the standards or regulations; *Provided* that it shall not request the revision of standards internationally agreed pursuant to recommendations made under paragraph 7 of Article 39.

ARTICLE 21

Restrictions to safeguard the Balance of Payments

1. The Members recognise that :

(*a*) it is primarily the responsibility of each Member to safeguard its external financial position and to achieve and maintain stable equilibrium in its balance of payments;

(*b*) an adverse balance of payments of one Member country may have important effects on the trade and balance of payments of other Member countries, if it results in, or may lead to, the imposition by the Member of restrictions affecting international trade;

(*c*) the balance of payments of each Member country is of concern to other Members, and therefore it is desirable that the Organisation should promote consultations among Members and, where possible, agreed action consistent with this Charter for the purpose of correcting a maladjustment in the balance of payments; and

(*d*) action taken to restore stable equilibrium in the balance of payments should, so far as the Member or Members concerned find possible, employ methods which expand rather than contract international trade.

2. Notwithstanding the provisions of paragraph 1 of Article 20, any Member, in order to safeguard its external financial position and balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.

3. (*a*) No Member shall institute, maintain or intensify import restrictions under this Article except to the extent necessary

(i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or

(ii) in the case of a Member with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the Member's reserves, or need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

(*b*) A Member applying restrictions under sub-paragraph (*a*) shall progressively relax and ultimately eliminate them, in accordance with the provisions of that sub-paragraph, as its external financial position improves. This provision shall not be interpreted to mean that a Member is required to relax or remove such restrictions if that relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of restrictions under sub-paragraph (*a*).

(*c*) Members undertake :

(i) not to apply restrictions so as to prevent unreasonably

the importation of any description of merchandise in minimum commercial quantities the exclusion of which would impair regular channels of trade, or restrictions which would prevent the importation of commercial samples or prevent the importation of such minimum quantities of a product as may be necessary to obtain and maintain patent, trade mark, copyright or similar rights under industrial or intellectual property laws;

(ii) to apply restrictions under this Article in such a way as to avoid unnecessary damage to the commercial or economic interests of any other Member, including interests under Articles 3 and 9.

4. (*a*) The Members recognise that in the early years of the Organisation all of them will be confronted in varying degrees with problems of economic adjustment resulting from the war. During this period the Organisation shall, when required to take decisions under this Article or under Article 23, take full account of the difficulties of post-war adjustment and of the need which a Member may have to use import restrictions as a step towards the restoration of equilibrium in its balance of payments on a sound and lasting basis.

(*b*) The Members recognise that, as a result of domestic policies directed toward the fulfilment of a Member's obligations under Article 3 relating to the achievement and maintenance of full and productive employment and large and steadily growing demand, or its obligations under Article 9 relating to the reconstruction or development of industrial and other economic resources and to the raising of standards of productivity, such a Member may find that demands for foreign exchange on account of imports and other current payments are absorbing the foreign exchange resources currently available to it in such a manner as to exercise pressure on its monetary reserves which would justify the institution or maintenance of restrictions under paragraph 3 of this Article. Accordingly,

(i) no Member shall be required to withdraw or modify restrictions which it is applying under this Article on the ground that a change in such policies would render these restrictions unnecessary;

(ii) any Member applying import restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of such policies.

(*c*) Members undertake, in carrying out their domestic policies, to pay due regard to the need for restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources.

6. If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the Organisations shall initiate discussions to consider whether other measures might be taken, either by those Members whose balances of payments are under pressure or by those Members whose balances of payments are tending to be exceptionally favourable, or by any appropriate inter-governmental organisation, to remove the underlying causes of the disequilibrium. On the invitation of the Organisation, Members shall participate in such discussions.

ARTICLE 22

Non-discriminatory Administration of Quantitative Restrictions

1. No prohibition or restriction shall be applied by any Member on the importation of any product of any other Member country or on the exportation of any product destined for any other Member country, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible to the shares which the various Member countries might be expected to obtain in the absence of such restrictions, and to this end shall observe the following provisions:

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any Member and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

ARTICLE 23

Exceptions to the Rule of Non-discrimination

1. (*a*) The Members recognise that the aftermath of the war has brought difficult problems of economic adjustment which do not permit the immediate full achievement of non-discriminatory administration of quantitative restrictions and therefore require the exceptional transitional period arrangements set forth in this paragraph.

(*b*) A Member which applies restrictions under Article 21 may, in the use of such restrictions, deviate from the provisions of Article 22 in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that Member may at that time apply under Article XIV of the Articles of Agreement of the International Monetary Fund, or under an analogous provision of a special exchange agreement entered into pursuant to paragraph 6 of Article 24.

2. Whether or not its transitional period arrangements have

terminated pursuant to paragraph 1 (*f*), a Member which is applying import restrictions under Article 21 may, with the consent of the Organisation, temporarily deviate from the provisions of Article 22 in respect of a small part of its external trade where the benefits to the Member or Members concerned substantially outweigh any injury which may result to the trade of other Members.

3. The provisions of Article 22 shall not preclude restrictions in accordance with the provisions of Article 24 which either

(*a*) are applied against imports from other countries, but not as among themselves, by a group of territories having a common quota in the International Monetary Fund, on condition that such restrictions are in all other respects consistent with the provisions of Article 22, or

(*b*) assist, in the period until December 31, 1951, by measures not involving substantial departure from the provisions of Article 22, another country whose economy has been disrupted by war.

4. A Member applying import restrictions under Article 21 shall not be precluded by this Section from applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article 22.

5. A Member shall not be precluded by this Section from applying quantitative restrictions

(*a*) having equivalent effect to exchange restrictions authorised under Section 3 (*b*) of Article VII of the Articles of Agreement of the International Monetary Fund; or

(*b*) under the preferential arrangements provided for in Annex A of this Charter, pending the outcome of the negotiations referred to therein.

Article 24

Relationship with the International Monetary Fund and Exchange Arrangements

1. The Organisation shall seek co-operation with the International Monetary Fund to the end that the Organisation and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the Organisation.

2. In all cases in which the Organisation is called upon to consider or deal with problems concerning monetary reserves, balance of payments or foreign exchange arrangements, the Organisation shall consult fully with the Fund. In such consultation, the Organisation shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balance of payments, and shall accept the determination of the Fund whether action by a Member with

respect to exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement entered into between that Member and the Organisation pursuant to paragraph 6 of this Article. When the Organisation is examining a situation in the light of the relevant considerations under all the pertinent provisions of Article 21 for the purpose of reaching its final decision in cases involving the criteria set forth in paragraph 3 (*a*) of that Article, it shall accept the determination of the Fund as to what constitutes a serious decline in the Member's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.

4. Members shall not, by exchange action, frustrate the intent of the provisions of this Section, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.

5. If the Organisation considers, at any time, that exchange restrictions on payments and transfers in connection with imports are being applied by a Member in a manner inconsistent with the provisions of this Section with respect to quantitative restrictions, it shall report thereon to the Fund.

6. (*a*) Any Member of the Organisation which is not a member of the Fund shall, within a time to be determined by the Organisation after consultation with the Fund, become a member of the Fund or, failing that, enter into a special exchange agreement with the Organisation. A Member of the Organisation which ceases to be a member of the Fund shall forthwith enter into a special exchange agreement with the Organisation. Any special exchange agreement entered into by a Member under this sub-paragraph shall thereupon become part of its obligations under this Charter.

7. A Member which is not a member of the Fund, whether or not it has entered into a special exchange agreement, shall furnish such information within the general scope of Section 5 of Article VIII of the Articles of Agreement of the International Monetary Fund as the Organisation may require in order to carry out its functions under this Charter.

8. Nothing in this Section shall preclude :

(*a*) the use by a Member of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund or with that Member's special exchange agreement with the Organisation, or

(*b*) the use by a Member of restrictions or controls on imports or exports, the sole effect of which, in addition to the effects permitted under Articles 20, 21, 22 and 23, is to make effective such exchange controls or exchange restrictions.

Section C—Subsidies

Article 25

Subsidies in General

If any Member grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to maintain or increase exports of any product from, or to reduce, or prevent an increase in, imports of any product into, its territory, the Member shall notify the Organisation in writing of the extent and nature of the subsidisation, of the estimated effect of the subsidisation on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidisation necessary. In any case in which a Member considers that serious prejudice to its interests is caused or threatened by any such subsidisation, the Member granting the subsidy shall, upon request, discuss with the other Member or Members concerned, or with the Organisation, the possibility of limiting the subsidisation.

Article 26

Additional Provisions on Export Subsidies

1. No member shall grant, directly or indirectly, any subsidy on the export of any product, or establish or maintain any other system, which subsidy or system results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, due allowance being made for differences in the conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. The exemption of exported products from duties or taxes imposed in respect of like products when consumed domestically, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be in conflict with the provisions of paragraph 1. The use of the proceeds of such duties or taxes to make payments to domestic producers in general of those products shall be considered as a case under Article 25.

Article 27

Special Treatment of Primary Commodities

Article 28

Undertaking regarding Stimulation of Exports of Primary Commodities

1. Any Member granting any form of subsidy, which operates directly or indirectly to maintain or increase the export of any

primary commodity from its territory, shall not apply the subsidy in such a way as to have the effect of maintaining or acquiring for that Member more than an equitable share of world trade in that commodity.

SECTION D—STATE TRADING AND RELATED MATTERS

ARTICLE 29

Non-discriminatory Treatment

1. (*a*) Each Member undertakes that if it establishes or maintains a state enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases and sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Charter for governmental measures affecting imports or exports by private traders.

(*b*) The provisions of sub-paragraph (*a*) shall be understood to require that such enterprises shall, having due regard to the other provisions of this Charter, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other Member countries adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

(*c*) No Member shall prevent any enterprise (whether or not an enterprise described in sub-paragraph (*a*)) under its jurisdiction from acting in accordance with the principles of sub-paragraphs (*a*) and (*b*).

2. The provisions of paragraph 1 shall not apply to imports of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale. With respect to such imports, and with respect to the laws, regulations and requirements referred to in paragraph 8 (*a*) of Article 18, each Member shall accord to the trade of the other Members fair and equitable treatment.

ARTICLE 30

Marketing Organisations

If a Member establishes or maintains a marketing board, commission or similar organisation, the Member shall be subject:

(*a*) with respect to purchases or sales by any such organisation, to the provisions of paragraph 1 of Article 29;

(*b*) with respect to any regulations of any such organisation governing the operations of private enterprises, to the other relevant provisions of this Charter.

Article 31

Expansion of Trade

1. If a Member establishes, maintains or authorises, formally or in effect, a monopoly of the importation or exportation of any product, the Member shall, upon the request of any other Member or Members having a substantial interest in trade with it in the product concerned, negotiate with such other Member or Members in the manner provided for under Article 17 in respect of tariffs, and subject to all the provisions of this Charter with respect to such tariff negotiations, with the object of achieving :

(*a*) in the case of an export monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic users of the monopolised product, or designed to assure exports of the monopolised product in adequate quantities at reasonable prices;

(*b*) in the case of an import monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic producers of the monopolised product, or designed to relax any limitation on imports which is comparable with a limitation made subject to negotiation under other provisions of this Charter.

2. In order to satisfy the requirements of paragraph 1 (*b*), the Member establishing, maintaining or authorising a monopoly shall negotiate :

(*a*) for the establishment of the maximum import duty that may be applied in respect of the product concerned; or

(*b*) for any other mutually satisfactory arrangement consistent with the provisions of this Charter, if it is evident to the negotiating parties that to negotiate a maximum import duty under sub-paragraph (*a*) of this paragraph is impracticable or would be ineffective for the achievement of the objectives of paragraph 1; any Member entering into negotiations under this sub-paragraph shall afford to other interested Members an opportunity for consultation.

3. In any case in which a maximum import duty is not negotiated under paragraph 2 (*a*), the Member establishing, maintaining or authorising the import monopoly shall make public, or notify the Organisation of, the maximum import duty which it will apply in respect of the product concerned.

5. With regard to any product to which the provisions of this Article apply, the monopoly shall, wherever this principle can be effectively applied and subject to the other provisions of this Charter, import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product, account being taken of any rationing to

consumers of the imported and like domestic product which may be in force at that time.

6. In applying the provisions of this Article, due regard shall be had for the fact that some monopolies are established and operated mainly for social, cultural, humanitarian or revenue purposes.

7. This Article shall not limit the use by Members of any form of assistance to domestic producers permitted by other provisions of this Charter.

ARTICLE 32

Liquidation of Non-commercial Stocks

1. If a Member holding stocks of any primary commodity accumulated for non-commercial purposes should liquidate such stocks, it shall carry out the liquidation, as far as practicable, in a manner that will avoid serious disturbance to world markets for the commodity concerned.

SECTION E—GENERAL COMMERCIAL PROVISIONS

ARTICLE 33

Freedom of Transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a Member country, when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the Member country across whose territory the traffic passes. Traffic of this nature is termed in this Article " traffic in transit ".

2. There shall be freedom of transit through each Member country, via the routes most convenient for international transit, for traffic in transit to or from other Member countries. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any Member may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to other Member countries shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges commensurate with administrative expenses entailed by transit or with the cost of services rendered.

4. All charges and regulations imposed by Members on traffic in transit to or from other Member countries shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations and formalities in connection with transit, each Member shall accord to traffic in transit to or from any other Member country treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.

6. The Organisation may undertake studies make recommendations and promote international agreement relating to the simplification of customs regulations concerning traffic in transit, the equitable use of facilities required for such transit and other measures designed to promote the objectives of this Article. Members shall co-operate with each other directly and through the Organisation to this end.

7. Each Member shall accord to goods which have been in transit through any other Member country treatment no less favourable than that which would have been accorded to such goods had they been transported from their place of origin to their destination without going through such other Member country. Any Member shall, however, be free to maintain its requirements of direct consignment existing on the date of this Charter, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the Member's prescribed method of valuation for customs purposes.

8. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

Article 34

Anti-dumping and Countervailing Duties

1. The Members recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in a Member country or materially retards the establishment of a domestic industry.

2. In order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

3. No countervailing duty shall be levied on any product of any Member country imported into another Member country in excess

of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term ' countervailing duty ' shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture production or export of any merchandise.

4. No product of any Member country imported into any other Member country shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of any Member country imported into any other Member country shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidisation.

6. No Member shall levy any anti-dumping or countervailing duty on the importation of any product of another Member country unless it determines that the effect of the dumping or subsidisation, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry. The Organisation may waive the requirements of this paragraph so as to permit a Member to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidisation which causes or threatens material injury to an industry in another Member country exporting the product concerned to the importing Member country.

7. A system for the stabilisation of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the Members substantially interested in the commodity concerned that :

(*a*) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(*b*) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other Members.

Article 35

Valuation for Customs Purposes

1. The Members shall work toward the standardisation, as far as practicable, of definitions of value and of procedures for determining the value of products subject to customs duties or other charges or restrictions based upon or regulated in any manner by value.

2. The Members recognise the validity of the general principles of valuation set forth in paragraphs 3, 4 and 5, and they undertake to give effect, at the earliest practicable date, to these principles in respect of all products subject to duties or other charges or restrictions on importation based upon or regulated in any manner by value.

3. (*a*) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.

(*b*) 'Actual value' should be the price at which, at a time and place determined by the legislation of the country of importation, and in the ordinary course of trade, such or like merchandise is sold or offered for sale under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.

(*c*) When the actual value is not ascertainable in accordance with sub-paragraph (*b*), the value for customs purposes should be based on the nearest ascertainable equivalent of such value.

4. The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin or export, from which the imported product has been exempted or has been or will be relieved by means of refund.

5. (*a*) Except as otherwise provided in this paragraph, where it is necessary for the purposes of paragraph 3 for a Member to convert into its own currency a price expressed in the currency of another country, the conversion rate of exchange to be used shall be based on the par values of the currencies involved, as established pursuant to the Articles of Agreement of the International Monetary Fund or by special exchange agreements entered into pursuant to Article 24 of this Charter.

(*b*) Where no such par value has been established, the conversion rate shall reflect effectively the current value of such currency in commercial transactions.

ARTICLE 36

Formalities connected with Importation and Exportation

1. The Members recognise that all fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article 18) imposed by governmental authorities on or in connection with importation or exportation should be limited in amount to the approximate cost of services rendered and should not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes. The Members also recognise the need for reducing the number and diversity of such fees and charges, for minimising the incidence and complexity of import and export formalities, and for decreasing and simplifying import and export documentation requirements.

6. The Members recognise that tariff descriptions based on distinctive regional or geographical names should not be used in such a manner as to discriminate against products of Member countries.

ARTICLE 37

Marks of Origin

1. The Members recognise that, in adopting and implementing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum.

2. Each Member shall accord to the products of each other Member country treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.

ARTICLE 38

Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or governmental agency of any Member country and the government or governmental

agency of any other country shall also be published. Copies of such laws, regulations, decisions, rulings and agreements shall be communicated promptly to the Organisation. The provisions of this paragraph shall not require any Member to divulge confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any Member effecting an advance in a rate of duty or other charge on imports under an established and uniform practice or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially made public.

3. (*a*) Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1. Suitable facilities shall be afforded for traders directly affected by any of those matters to consult with the appropriate governmental authorities.

(*b*) Each Member shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(*c*) The provisions of sub-paragraph (*b*) shall not require the elimination or substitution of procedures in force in a Member country on the date of this Charter which in fact provide for an objective and impartial review of administrative action, even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any Member employing such procedures shall, upon request, furnish the Organisation with full information thereon in order that the Organisation may determine whether such procedures conform to the requirements of this sub-paragraph.

Article 39

Information, Statistics and Trade Terminology

SECTION F—SPECIAL PROVISIONS

ARTICLE 40

Emergency Action on Imports of Particular Products

ARTICLE 41

Consultation

Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by any other Member with respect to the operation of customs regulations and formalities, anti-dumping and countervailing duties, quantitative and exchange regulations, internal price regulations, subsidies, transit regulations and practices, state trading, sanitary laws and regulations for the protection of human, animal or plant life or health, and generally with respect to all matters affecting the operation of this Chapter.

ARTICLE 42

Territorial Application of Chapter IV

1. The provisions of Chapter IV shall apply to the metropolitan customs territories of the Members and to any other customs territories in respect of which this Charter has been accepted in accordance with the provisions of Article 104. Each such customs territory shall, exclusively for the purposes of the territorial application of Chapter IV, be treated as though it were a Member; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Charter has been accepted by a single Member.

2. For the purposes of this Chapter a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

ARTICLE 43

Frontier Traffic

The provisions of this Chapter shall not be construed to prevent :

(*a*) advantages accorded by any Member to adjacent countries in order to facilitate frontier traffic;

Article 44

Customs Unions and Free-Trade Areas

1. Members recognise the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognise that the purpose of a customs union or free-trade area should be to facilitate trade between the parties and not to raise barriers to the trade of other Member countries with such parties.

2. Accordingly, the provisions of this Chapter shall not prevent, as between the territories of Members, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

(*a*) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with Member countries not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(*b*) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of Member countries not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement, as the case may be; and

(*c*) any interim agreement referred to in sub-paragraphs (*a*) or (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

4. For the purposes of this Charter:

(*a*) a customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Section B of Chapter IV and under Article 45) are eliminated with respect to substantially all the

trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 5, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(*b*) a free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Section B of Chapter IV and under Article 45) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

ARTICLE 45

General Exceptions to Chapter IV

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Member of measures

(*a*) (i) necessary to protect public morals;

(ii) necessary to the enforcement of laws and regulations relating to public safety;

(iii) necessary to protect human, animal or plant life or health;

(iv) relating to the importation or exportation of gold or silver;

(v) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter, including those relating to customs enforcement, the enforcement of monopolies operated under Section D of this Chapter, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(vi) relating to the products of prison labour;

(vii) imposed for the protection of national treasures of artistic, historic or archaeological value;

(viii) relating to the conservation of exhaustible natural resources if such measures are more effective in conjunction with restrictions on domestic production or consumption;

(ix) taken in pursuance of inter-governmental commodity agreements concluded in accordance with the provisions of Chapter VI;

(x) taken in pursuance of any inter-governmental agreement which relates solely to the conservation of fisheries resources, migratory birds or wild animals and which is subject to the requirements of paragraph 1 (*d*) of Article 70; or

(xi) involving restrictions on exports of domestic materials necessary to assure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilisation plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry and shall not depart from the provisions of this Chapter relating to non-discrimination;

(*b*) (i) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with any general inter-governmental arrangements directed to an equitable international distribution of such products or, in the absence of such arrangements, with the principle that all Members are entitled to an equitable share of the international supply of such products;

(ii) essential to the control of prices by a Member country experiencing shortages subsequent to the Second World War; or

(iii) essential to the orderly liquidation of temporary surpluses of stocks owned or controlled by the government of any Member country, or of industries developed in any Member country owing to the exigencies of the Second World War which it would be uneconomic to maintain in normal conditions: *Provided* that such measures shall not be instituted by any Member except after consultation with other interested Members with a view to appropriate international action.

2. Measures instituted or maintained under paragraph 1 (*b*) which are inconsistent with the other provisions of this Chapter shall be removed as soon as the conditions giving rise to them have ceased, and in any event not later that at a date to be specified by the Organisation; *Provided* that such date may be deferred for a further period or periods, with the concurrence of the Organisation, either generally or in relation to particular measures taken by Members in respect of particular products.

CHAPTER V

RESTRICTIVE BUSINESS PRACTICES

ARTICLE 46

General Policy towards Restrictive Business Practices

1. Each Member shall take appropriate measures and shall co-operate with the Organisation to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1.

2. In order that the Organisation may decide in a particular instance whether a practice has or is about to have the effect indicated in paragraph 1, the Members agree, without limiting paragraph 1, that complaints regarding any of the practices listed in paragraph 3 shall be subject to investigation in accordance with the procedure regarding complaints provided for in Articles 48 and 50, whenever

(*a*) such a complaint is presented to the Organisation, and

(*b*) the practice is engaged in, or made effective by one or more private or public commercial enterprises or by any combination, agreement or other arrangement between any such enterprises, and

(*c*) such commercial enterprises, individually or collectively, possess effective control of trade among a number of countries in one or more products.

3. The practices referred to in paragraph 2 are the following:

(*a*) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;

(*b*) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;

(*c*) discriminating against particular enterprises;

(*d*) limiting production or fixing production quotas;

(*e*) preventing by agreement the development or application of technology or invention whether patented or unpatented;

(*f*) extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of

production, use or sale which are likewise not the subjects of such grants;

(*g*) any similar practices which the Organisation may declare, by a majority of two-thirds of the Members present and voting, to be restrictive business practices.

Article 47

Consultation Procedure

Article 48

Investigation Procedure

Article 49

Studies relating to Restrictive Business Practices

Article 50

Obligations of Members

1. Each Member shall take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organisation, to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in practices which are as specified in paragraphs 2 and 3 of Article 46 and have the effect indicated in paragraph 1 of that Article, and it shall assist the Organisation in preventing these practices.

Article 51

Co-operative Remedial Arrangements

1. Members may co-operate with each other for the purpose of making more effective within their respective jurisdictions any remedial measures taken in furtherance of the objectives of this Chapter and consistent with their obligations under other provisions of this Charter.

Article 52

Domestic Measures against Restrictive Business Practices

No act or omission to act on the part of the Organisation shall preclude any Member from enforcing any national statute or decree directed towards preventing monopoly or restraint of trade.

ARTICLE 53

Special Procedures with respect to Services

1. The Members recognise that certain services, such as transportation, telecommunications, insurance and the commercial services of banks, are substantial elements of international trade and that any restrictive business practices by enterprises engaged in these activities in international trade may have harmful effects similar to those indicated in paragraph 1 of Article 46. Such practices shall be dealt with in accordance with the following paragraphs of this Article.

2. If any Member considers that there exist restrictive business practices in relation to a service referred to in paragraph 1 which have or are about to have such harmful effects, and that its interests are thereby seriously prejudiced, the Member may submit a written statement explaining the situation to the Member or Members whose private or public enterprises are engaged in the services in question. The Member or Members concerned shall give sympathetic consideration to the statement and to such proposals as may be made and shall afford adequate opportunities for consultation, with a view to effecting a satisfactory adjustment.

3. If no adjustment can be effected in accordance with the provisions of paragraph 2, and if the matter is referred to the Organisation, it shall be transferred to the appropriate inter-governmental organisation, if one exists, with such observations as the Organisation may wish to make. If no such inter-governmental organisation exists, and if Members so request, the Organisation may, in accordance with the provisions of paragraph 1 (*c*) of Article 72, make recommendations for, and promote international agreement on, measures designed to remedy the particular situation so far as it comes within the scope of this Charter.

4. The Organisation shall, in accordance with paragraph 1 of Article 87, co-operate with other inter-governmental organisations in connection with restrictive business practices affecting any field coming within the scope of this Charter and those organisations shall be entitled to consult the Organisation, to seek advice, and to ask that a study of a particular problem be made.

ARTICLE 54

Interpretation and Definition

1. The provisions of this Chapter shall be construed with due regard for the rights and obligations of Members set forth elsewhere in this Charter and shall not therefore be so interpreted as to prevent the adoption and enforcement of any measures in so far as they are specifically permitted under other Chapters of this Charter. The Organisation may, however, make recommendations to

Members or to any appropriate inter-governmental organisation concerning any features of these measures which may have the effect indicated in paragraph 1 of Article 46.

CHAPTER VI

INTER-GOVERNMENTAL COMMODITY AGREEMENTS

Section A—Introductory Considerations

Article 55

Difficulties relating to Primary Commodities

The Members recognise that the conditions under which some primary commodities are produced, exchanged and consumed are such that international trade in these commodities may be affected by special difficulties such as the tendency towards persistent disequilibrium between production and consumption, the accumulation of burdensome stocks and pronounced fluctuations in prices. These special difficulties may have serious adverse effects on the interests of producers and consumers, as well as widespread repercussions jeopardising the general policy of economic expansion. The Members recognise that such difficulties may, at times, necessitate special treatment of the international trade in such commodities through inter-governmental agreement.

Article 56

Primary and Related Commodities

1. For the purposes of this Charter, the term 'primary commodity' means any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

Article 57

Objectives of Inter-governmental Commodity Agreements

The Members recognise that inter-governmental commodity agreements are appropriate for the achievement of the following objectives :

(*a*) to prevent or alleviate the serious economic difficulties which may arise when adjustments between production and consumption cannot be effected by normal market forces alone as rapidly as the circumstances require ;

(*b*) to provide, during the period which may be necessary, a

framework for the consideration and development of measures which have as their purpose economic adjustments designed to promote the expansion of consumption or a shift of resources and man-power out of over-expanded industries into new and productive occupations, including as far as possible in appropriate cases, the development of secondary industries based upon domestic production of primary commodities;

(*c*) to prevent or moderate pronounced fluctuations in the price of a primary commodity with a view to achieving a reasonable degree of stability on a basis of such prices as are fair to consumers and provide a reasonable return to producers, having regard to the desirability of securing long-term equilibrium between the forces of supply and demand;

(*d*) to maintain and develop the natural resources of the world and protect them from unnecessary exhaustion;

(*e*) to provide for the expansion of the production of a primary commodity where this can be accomplished with advantage to consumers and producers, including in appropriate cases the distribution of basic foods at special prices;

(*f*) to assure the equitable distribution of a primary commodity in short supply.

SECTION B—INTER-GOVERNMENTAL COMMODITY AGREEMENTS IN GENERAL

ARTICLE 58

Commodity Studies

1. Any Member which considers itself substantially interested in the production or consumption of, or trade in, a particular primary commodity, and which considers that international trade in that commodity is, or is likely to be, affected by special difficulties, shall be entitled to ask that a study of the commodity be made.

ARTICLE 59

Commodity Conferences

1. The Organisation shall promptly convene an inter-governmental conference to discuss measures designed to meet the special difficulties which exist or are expected to arise concerning a particular primary commodity:

(*a*) on the basis of the recommendations of a study group, or

(*b*) at the request of Members whose interests represent a significant part of world production or consumption of, or trade in, that commodity, or

(*c*) at the request of Members which consider that their economies are dependent to an important extent on that commodity, unless the Organisation considers that no useful purpose could be achieved by convening the conference, or

(*d*) on its own initiative, on the basis of information agreed to be adequate by the Members substantially interested in the production or consumption of, or trade in, that commodity.

2. Each Member which considers itself substantially interested in the production or consumption of, or trade in, the commodity concerned, shall be invited to participate in such a conference. Non-Members may also be invited to participate.

ARTICLE 60

General Principles governing Commodity Agreements

1. The Members shall observe the following principles in the conclusion and operation of all types of inter-governmental commodity agreements :

(*a*) Such agreements shall be open to participation, initially by any Member on terms no less favourable than those accorded to any other country, and thereafter in accordance with such procedure and upon such terms as may be established in the agreement, subject to approval by the Organisation.

(*b*) Non-Members may be invited by the Organisation to participate in such agreements and the provisions of sub-paragraph (*a*) applying to Members shall also apply to any non-Member so invited.

(*c*) Under such agreements there shall be equitable treatment as between participating countries and non-participating Members, and the treatment accorded by participating countries to non-participating Members shall be no less favourable than that accorded to any non-participating non-Member, due consideration being given in each case to policies adopted by non-participants in relation to obligations assumed and advantages conferred under the agreement.

(*d*) Such agreements shall include provision for adequate participation of countries substantially interested in the importation or consumption of the commodity as well as those substantially interested in its exportation or production.

(*e*) Full publicity shall be given to any inter-governmental commodity agreement proposed or concluded, to the statements of considerations and objectives advanced by the proposing Members, to the nature and development of measures adopted to correct the underlying situation which gave rise to the agreement and, periodically, to the operation of the agreement.

2. The Members, including Members not parties to a particular

commodity agreement, shall give favourable consideration to any recommendation made under the agreement for expanding consumption of the commodity in question.

ARTICLE 61

Types of Agreements

1. For the purposes of this Chapter, there are two types of inter-governmental commodity agreements :

(*a*) commodity control agreements as defined in this Article ; and

(*b*) other inter-governmental commodity agreements.

2. Subject to the provisions of paragraph 5, a commodity control agreement is an inter-governmental agreement which involves :

(*a*) the regulation of production or the quantitative control of exports or imports of a primary commodity and which has the purpose or might have the effect of reducing, or preventing an increase in, the production of, or trade in, that commodity ; or

(*b*) the regulation of prices.

3. The Organisation shall, at the request of a Member, a study group or a commodity conference, decide whether an existing or proposed inter-governmental agreement is a commodity control agreement within the meaning of paragraph 2.

4. (*a*) Commodity control agreements shall be subject to all the provisions of this Chapter.

(*b*) Other inter-governmental commodity agreements shall be subject to the provisions of this Chapter other than those of Section C. If, however, the Organisation decides that an agreement which involves the regulation of production or the quantitative control of exports or imports is not a commodity control agreement within the meaning of paragraph 2, it shall prescribe the provisions of Section C, if any, to which that agreement shall conform.

5. An existing or proposed inter-governmental agreement the purpose of which is to secure the co-ordinated expansion of aggregate world production and consumption of a primary commodity may be treated by the Organisation as not being a commodity control agreement, even though the agreement provides for the future application of price provisions, provided that

(*a*) at the time the agreement is entered into, a commodity conference finds that the conditions contemplated are in accordance with the provisions of Article 62, and

(*b*) from the date on which the price provisions become operative, the agreement shall conform to all the provisions of Section C, except that no further finding will be required under Article 62.

6. Members shall enter into any new commodity control agreement only through a conference called in accordance with the provisions of Article 59 and after an appropriate finding has been

made under Article 62. If, in an exceptional case, there has been unreasonable delay in the convening or in the proceedings of the study group or of the commodity conference, Members which consider themselves substantially interested in the production or consumption of, or trade in, a particular primary commodity, may proceed by direct negotiation to the conclusion of an agreement, provided that the situation is one contemplated in Article 62 (*a*) or (*b*) and that the agreement conforms to the other provisions of this Chapter.

Section C—Inter-governmental Commodity Control Agreements

Article 62

Circumstances governing the Use of Commodity Control Agreements

The Members agree that commodity control agreements may be entered into only when a finding has been made through a commodity conference or through the Organisation by consultation and general agreement among Members substantially interested in the commodity, that:

(*a*) a burdensome surplus of a primary commodity has developed or is expected to develop, which, in the absence of specific governmental action, would cause serious hardship to producers among whom are small producers who account for a substantial portion of the total output, and that these conditions could not be corrected by normal market forces in time to prevent such hardship, because characteristically in the case of the primary commodity concerned, a substantial reduction in price does not readily lead to a significant increase in consumption or to a significant decrease in production; or

(*b*) widespread unemployment or under-employment in connection with a primary commodity, arising out of difficulties of the kind referred to in Article 55, has developed or is expected to develop, which, in the absence of specific governmental action, would not be corrected by normal market forces in time to prevent widespread and undue hardship to workers because, characteristically in the case of the industry concerned, a substantial reduction in price does not readily lead to a significant increase in consumption but to a reduction of employment, and because in areas in which the commodity is produced in substantial quantity do not afford alternative employment opportunities for the workers involved.

ARTICLE 63

Additional Principles governing Commodity Control Agreements

The Members shall observe the following principles governing the conclusion and operation of commodity control agreements, in addition to those stated in Article 60:

(*a*) Such agreements shall be designed to assure the availability of supplies adequate at all times for world demand at prices which are in keeping with the provisions of Article 57 (*c*), and, when practicable, shall provide for measures designed to expand world consumption of the commodity.

(*b*) Under such agreements, participating countries which are mainly interested in imports of the commodity concerned shall, in decisions on substantive matters, have together a number of votes equal to that of those mainly interested in obtaining export markets for the commodity. Any participating country, which is interested in the commodity but which does not fall precisely under either of the above classes, shall have an appropriate voice within such classes.

(*c*) Such agreements shall make appropriate provision to afford increasing opportunities for satisfying national consumption and world market requirements from sources from which such requirements can be supplied in the most effective and economic manner, due regard being had to the need for preventing serious economic and social dislocation and to the position of producing areas suffering from abnormal disabilities.

(*d*) Participating countries shall formulate and adopt programmes of internal economic adjustment believed to be adequate to ensure as much progress as practicable within the duration of the agreement towards solution of the commodity problem involved.

ARTICLE 64

Administration of Commodity Control Agreements

1. Each commodity control agreement shall provide for the establishment of a governing body, herein referred to as a Commodity Council, which shall operate in conformity with the provisions of this Article.

2. Each participating country shall be entitled to have one representative on the Commodity Council. The voting power of the representatives shall be determined in conformity with the provisions of Article 63 (*b*).

3. The Organisation shall be entitled to appoint a non-voting representative to each Commodity Council and may invite any competent inter-governmental organisation to nominate a non-voting representative for appointment to a Commodity Council.

4. Each Commodity Council shall appoint a non-voting chairman who, if the Council so requests, may be nominated by the Organisation.

5. The Secretariat of each Commodity Council shall be appointed by the Council after consultation with the Organisation.

6. Each Commodity Council shall adopt appropriate rules of procedure and regulations regarding its activities. The Organisation may at any time require their amendment if it considers that they are inconsistent with the provisions of this Chapter.

7. Each Commodity Council shall make periodic reports to the Organisation on the operation of the agreement which it administers. It shall also make such special reports as the Organisation may require or as the Council itself considers to be of value to the Organisation.

8. The expenses of a Commodity Council shall be borne by the participating countries.

9. When an agreement is terminated, the Organisation shall take charge of the archives and statistical material of the Commodity Council.

Article 65

Initial Term, Renewal and Review of Commodity Control Agreements

Article 66

Settlement of Disputes

Section D—Miscellaneous Provisions

Article 67

Relations with Inter-governmental Organisations

Article 68

Obligations of Members regarding Existing and Proposed Commodity Agreements

1. Members shall transmit to the Organisation the full text of each inter-governmental commodity agreement in which they are participating at the time they become Members of the Organisation, together with appropriate information regarding the formulation, provisions and operation of any such agreement. If, after review, the Organisation finds that any such agreement is inconsistent with the provisions of this Chapter, it shall communicate such finding to the Members concerned in order to secure promptly the adjustment of the agreement to bring it into conformity with the provisions of this Chapter.

2. Members shall transmit to the Organisation appropriate information regarding any negotiations for the conclusion of an inter-governmental commodity agreement in which they are participating at the time they become Members of the Organisation. If, after review, the Organisation finds that any such negotiations are inconsistent with the provisions of this Chapter, it shall communicate such finding to the Members concerned in order to secure prompt action with regard to their participation in such negotiations. The Organisation may waive the requirement of a study group or a commodity conference, if it finds it unnecessary in the light of the negotiations.

ARTICLE 69

Territorial Application

For the purposes of this Chapter, the terms ' Member ' and ' non-Member ' shall include the dependent territories of a Member and non-Member of the Organisation respectively. If a Member or non-Member and its dependent territories form a group, of which one or more units are mainly interested in the export of a commodity and one or more in the import of the commodity, there may be either joint representation for all the territories within the group or, where the Member or non-Member so wishes, separate representation for the territories mainly interested in exportation and separate representation for the territories mainly interested in importation.

ARTICLE 70

Exceptions to Chapter VI

1. The provisions of this Chapter shall not apply :
   (*a*) to any bilateral inter-governmental agreement relating to the purchase and sale of a commodity falling under Section D of Chapter IV;
   (*b*) to any inter-governmental commodity agreement involving no more than one exporting country and no more than one importing country and not covered by sub-paragraph (*a*) above; *Provided* that if, upon complaint by a non-participating Member, the Organisation finds that the interests of that Member are seriously prejudiced by the agreement, the agreement shall become subject to such provisions of this Chapter as the Organisation may prescribe;
   (*c*) to those provisions of any inter-governmental commodity agreement which are necessary for the protection of public morals or of human, animal or plant life or health, provided that such agreement is not used to accomplish results inconsistent with the objectives of Chapter V or Chapter VI;

(*d*) to any inter-governmental agreement relating solely to the conservation of fisheries resources, migratory birds or wild animals, provided that such agreement is not used to accomplish results inconsistent with the objectives of this Chapter or the purpose and objectives set forth in Article 1 and is given full publicity in accordance with the provisions of paragraph 1 (*e*) of Article 60; if the Organisation finds, upon complaint by a non-participating Member, that the interests of that Member are seriously prejudiced by the agreement, the agreement shall become subject to such provisions of this Chapter as the Organisation may prescribe.

2. The provisions of Articles 58 and 59 and of Section C of this Chapter shall not apply to inter-governmental commodity agreements found by the Organisation to relate solely to the equitable distribution of commodities in short supply.

3. The provisions of Section C of this Chapter shall not apply to commodity control agreements found by the Organisation to relate solely to the conservation of exhaustible natural resources.

CHAPTER VII

THE INTERNATIONAL TRADE ORGANISATION

Section A—Structure and Functions

Article 71

Membership

1. The original Members of the Organisation shall be :

(*a*) those States invited to the United Nations Conference on Trade and Employment whose governments accept this Charter, in accordance with the provisions of paragraph 1 of Article 103, by September 30, 1949 or, if the Charter shall not have entered into force by that date, those States whose governments agree to bring the Charter into force in accordance with the provisions of paragraph 2 (*b*) of Article 103;

(*b*) those separate customs territories invited to the United Nations Conference on Trade and Employment on whose behalf the competent member accepts this Charter, in accordance with the provisions of Article 104, by September 30, 1949 or, if the Charter shall not have entered into force by that date, such separate customs territories which agree to bring the Charter into force in accordance with the provisions of paragraph 2 (*b*) of Article 103 and on whose behalf the competent Member accepts the

Charter in accordance with the provisions of Article 104. If any of these customs territories shall have become fully responsible for the formal conduct of its diplomatic relations by the time it wishes to deposit an instrument of acceptance, it shall proceed in the manner set forth in sub-paragraph (*a*) of this paragraph.

2. Any other State whose membership has been approved by the Conference shall become a Member of the Organisation upon its acceptance, in accordance with the provisions of paragraph 1 of Article 103, of the Charter as amended up to the date of such acceptance.

3. Any separate customs territory not invited to the United Nations Conference on Trade and Employment, proposed by the competent Member having responsibility for the formal conduct of its diplomatic relations and which is autonomous in the conduct of its external commercial relations and of the other matters provided for in this Charter and whose admission is approved by the Conference, shall become a Member upon acceptance of the Charter on its behalf by the competent Member in accordance with the provisions of Article 104 or, in the case of a territory in respect of which the Charter has already been accepted under that Article, upon such approval by the Conference after it has acquired such autonomy.

4. The Conference shall determine, by a two-thirds majority of the Members present and voting, the conditions upon which, in each individual case, membership rights and obligations shall be extended to :

(*a*) the Free Territory of Trieste;

(*b*) any Trust Territory administered by the United Nations; and

(*c*) any other special regime established by the United Nations.

5. The Conference, on application by the competent authorities, shall determine the conditions upon which rights and obligations under this Charter shall apply to such authorities in respect of territories under military occupation and shall determine the extent of such rights and obligations.

ARTICLE 72

Functions

1. The Organisation shall perform the functions attributed to it elsewhere in this Charter. In addition, the Organisation shall have the following functions :

(*a*) to collect, analyse and publish information relating to international trade, including information relating to commercial policy, business practices, commodity problems and industrial and general economic development;

(*b*) to encourage and facilitate consultation among Members on all questions relating to the provisions of this Charter;

(*c*) to undertake studies, and, having due regard to the objectives of this Charter and the constitutional and legal systems of Members, make recommendations, and promote bilateral or multilateral agreements concerning, measures designed

(i) to assure just and equitable treatment for foreign nationals and enterprises;

(ii) to expand the volume and to improve the bases of international trade, including measures designed to facilitate commercial arbitration and the avoidance of double taxation;

(iii) to carry out, on a regional or other basis, having due regard to the activities of existing regional or other inter-governmental organisations, the functions specified in paragraph 2 of Article 10;

(iv) to promote and encourage establishments for the technical training that is necessary for progressive industrial and economic development; and,

(v) generally, to achieve any of the objectives set forth in Article 1;

(*d*) in collaboration with the Economic and Social Council of the United Nations and with such inter-governmental organisations as may be appropriate, to undertake studies on the relationship between world prices of primary commodities and manufactured products, to consider and, where appropriate, to recommend international agreements on, measures designed to reduce progressively any unwarranted disparity in those prices;

(*e*) generally, to consult with and make recommendations to the Members and, as necessary, furnish advice and assistance to them regarding any matter relating to the operation of this Charter, and to take any other action necessary and appropriate to carry out the provisions of the Charter;

(*f*) to co-operate with the United Nations and other inter-governmental organisations in furthering the achievement of the economic and social objectives of the United Nations and the maintenance or restoration of international peace and security.

2. In the exercise of its functions the Organisation shall have due regard to the economic circumstances of Members, to the factors affecting these circumstances and to the consequences of its determinations upon the interests of the Member or Members concerned.

ARTICLE 73

Structure

The Organisation shall have a Conference, an Executive Board, Commissions as established under Article 82, and such other organs as may be required. There shall also be a Director-General and Staff.

SECTION B—THE CONFERENCE

ARTICLE 74

Composition

1. The Conference shall consist of all the Members of the Organisation.

2. Each Member shall have one representative in the Conference and may appoint alternates and advisers to its representative.

ARTICLE 75

Voting

1. Each Member shall have one vote in the Conference.

2. Except as otherwise provided in this Charter, decisions of the Conference shall be taken by a majority of the Members present and voting; *Provided* that the rules of procedure of the Conference may permit a Member to request a second vote if the number of votes cast is less than half the number of the Members, in which case the decision reached on the second vote shall be final whether or not the total of the votes cast comprises more than half the number of the Members.

ARTICLE 76

Sessions, Rules of Procedure and Officers

1. The Conference shall meet at the seat of the Organisation in regular annual session and in such special sessions as may be convoked by the Director-General at the request of the Executive Board or of one-third of the Members. In exceptional circumstances, the Executive Board may decide that the Conference shall be held at a place other than the seat of the Organisation.

2. The Conference shall establish rules of procedure which may include rules appropriate for the carrying out of its functions during the intervals between its sessions. It shall annually elect its President and other officers.

Article 77

Powers and Duties

1. The powers and duties attributed to the Organisation by this Charter and the final authority to determine the policies of the Organisation shall be vested in the Conference.

2. The Conference may, by a vote of a majority of the Members, assign to the Executive Board any power or duty of the Organisation except such specific powers and duties as are expressly conferred or imposed upon the Conference by this Charter.

3. In exceptional circumstances not elsewhere provided for in this Charter, the Conference may waive an obligation imposed upon a Member by the Charter; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the Members. The Conference may also by such a vote define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations.

4. The Conference may prepare or sponsor agreements with respect to any matter within the scope of this Charter and, by a two-thirds majority of the Members present and voting, recommend such agreements for acceptance. Each Member shall within a period specified by the Conference, notify the Director-General of its acceptance or non-acceptance. In the case of non-acceptance, a statement of the reasons therefor shall be forwarded with the notification.

5. The Conference may make recommendations to intergovernmental organisations on any subject within the scope of this Charter.

6. The Conference shall approve the budget of the Organisation and shall apportion the expenditures of the Organisation among the Members in accordance with a scale of contributions to be fixed from time to time by the Conference following such principles as may be applied by the United Nations. If a maximum limit is established on the contribution of a single Member with respect to the budget of the United Nations, such limit shall also be applied with respect to contributions to the Organisation.

7. The Conference shall determine the seat of the Organisation and shall establish such branch offices as it may consider desirable.

Section C—The Executive Board

Article 78

Composition of the Executive Board

1. The Executive Board shall consist of eighteen Members of the Organisation selected by the Conference.

2. (*a*) The Executive Board shall be representative of the broad geographical areas to which the Members of the Organisation belong.

(*b*) A customs union, as defined in paragraph 4 of Article 44, shall be considered eligible for selection as a member of the Executive Board on the same basis as a single Member of the Organisation if all of the members of the customs union are Members of the Organisation and if all its members desire to be represented as a unit.

(*c*) In selecting the members of the Executive Board, the Conference shall have regard to the objective of ensuring that the Board includes Members of chief economic importance, in the determination of which particular regard shall be paid to their shares in international trade, and that it is representative of the different types of economies or degrees of economic development to be found within the membership of the Organisation.

3. (*a*) At intervals of three years the Conference shall determine, by a two-thirds majority of the Members present and voting, the eight Members of chief economic importance, in the determination of which particular regard shall be paid to their shares in international trade. The Members so determined shall be declared members of the Executive Board.

(*b*) The other members of the Executive Board shall be elected by the Conference by a two-thirds majority of the Members present and voting.

(*c*) If on two consecutive ballots no member is elected, the remainder of the election shall be decided by a majority of the Members present and voting.

4. Subject to the provisions of Annex L, the term of office of a member of the Executive Board shall be three years, and any vacancy in the membership of the Board may be filled by the Conference for the unexpired term of the vacancy.

5. The Conference shall establish rules for giving effect to this Article.

ARTICLE 79

Voting

1. Each member of the Executive Board shall have one vote.

2. Decisions of the Executive Board shall be made by a majority of the votes cast.

ARTICLE 80

Sessions, Rules of Procedure and Officers

1. The Executive Board shall adopt rules of procedure, which shall include rules for the convening of its sessions, and which may include rules appropriate for the carrying out of its functions during

the intervals between its sessions. The rules of procedure shall be subject to confirmation by the Conference.

2. The Executive Board shall annually elect its Chairman and other officers, who shall be eligible for re-election.

3. The Chairman of the Executive Board shall be entitled *ex officio* to participate, without the right to vote, in the deliberations of the Conference.

4. Any Member of the Organisation which is not a member of the Executive Board shall be invited to participate in the discussion by the Board of any matter of particular and substantial concern to that Member and shall, for the purpose of such discussion, have all the rights of a member of the Board, except the right to vote.

ARTICLE 81

Powers and Duties

1. The Executive Board shall be responsible for the execution of the policies of the Organisation and shall exercise the powers and perform the duties assigned to it by the Conference. It shall supervise the activities of the Commissions and shall take such action upon their recommendations as it may deem appropriate.

2. The Executive Board may make recommendations to the Conference, or to inter-governmental organisations, on any subject within the scope of this Charter.

ARTICLE 82

Establishment and Functions

The Conference shall establish such Commissions as may be required for the performance of the functions of the Organisation. The Commissions shall have such functions as the Conference may decide. They shall report to the Executive Board and shall perform such tasks as the Board may assign to them. They shall consult each other as necessary for the exercise of their functions.

ARTICLE 83

Composition and Rules of Procedure

1. The Commissions shall be composed of persons whose appointment, unless the Conference decides otherwise, shall be made by the Executive Board. In all cases, these persons shall be qualified by training and experience to carry out the functions of the Commission to which they are appointed.

2. The number of members, which for each Commission shall normally not exceed seven, and the conditions of service of such members shall be determined in accordance with regulations prescribed by the Conference.

3. Each Commission shall elect a Chairman. It shall adopt rules of procedure which shall be subject to approval by the Executive Board.

4. The rules of procedure of the Conference and of the Executive Board shall provide as appropriate for the participation in their deliberations, without the right to vote, of the chairmen of Commissions.

5. The Organisation shall arrange for representatives of the United Nations and of other inter-governmental organisations which are considered by the Organisation to have a special competence in the field of activity of any of the Commissions, to participate in the work of such Commission.

SECTION E—THE DIRECTOR-GENERAL AND STAFF

ARTICLE 84

The Director-General

1. The chief administrative officer of the Organisation shall be the Director-General. He shall be appointed by the Conference upon the recommendation of the Executive Board, and shall be subject to the general supervision of the Board. The powers, duties, conditions of service and terms of office of the Director-General shall conform to regulations approved by the Conference.

2. The Director-General or his representative shall be entitled to participate, without the right to vote, in all meetings of any organ of the Organisation.

3. The Director-General shall present to the Conference an annual report on the work of the Organisation, and the annual budget estimates and financial statements of the Organisation.

ARTICLE 85

The Staff

1. The Director-General, having first consulted with and having obtained the agreement of the Executive Board, shall have authority to appoint Deputy Directors-General in accordance with regulations approved by the Conference. The Director-General shall also appoint such additional members of the Staff as may be required and shall fix the duties and conditions of service of the members of the Staff, in accordance with regulations approved by the Conference.

2. The selection of the members of the Staff, including the appointment of the Deputy Directors-General, shall as far as possible be made on a wide geographical basis and with due regard to the various types of economy represented by Member countries.

The paramount consideration in the selection of candidates and in determining the conditions of service of the Staff shall be the necessity of securing the highest standards of efficiency, competence, impartiality and integrity.

3. The regulations concerning the conditions of service of members of the Staff, such as those governing qualifications, salary, tenure and retirement, shall be fixed, so far as practicable, in conformity with those for members of the Secretariat of the United Nations and of specialised agencies.

Section F—Other Organisational Provisions

Article 86

Relations with the United Nations

1. The Organisation shall be brought into relationship with the United Nations as soon as practicable as one of the specialised agencies referred to in Article 57 of the Charter of the United Nations. This relationship shall be effected by agreement approved by the Conference.

2. Any such agreement shall, subject to the provisions of this Charter, provide for effective co-operation and the avoidance of unnecessary duplication in the activities of these organisations, and for co-operation in furthering the maintenance or restoration of international peace and security.

3. The Members recognise that the Organisation should not attempt to take action which would involve passing judgment in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organisation with respect to such matters, any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter.

4. No action, taken by a Member in pursuance of its obligations under the United Nations Charter for the maintenance or restoration of international peace and security, shall be deemed to conflict with the provisions of this Charter.

Article 87

Relations with other Organisations

1. The Organisation shall make arrangements with other intergovernmental organisations, which have related responsibilities, to provide for effective co-operation and the avoidance of unnecessary duplication in the activities of these organisations. The Organisation

may for this purpose arrange for joint committees, reciprocal representation at meetings and establish such other working relationships as may be necessary.

2. The Organisation may make suitable arrangements for consultation and co-operation with non-governmental organisations concerned with matters within the scope of this Charter.

3. Whenever the Conference and the competent authorities of any inter-governmental organisation whose purposes and functions lie within the scope of this Charter deem it desirable

(*a*) to incorporate such inter-governmental organisations into the Organisation, or

(*b*) to transfer all or part of its functions and resources to the Organisation, or

(*c*) to bring it under the supervision or authority of the Organisation,

the Director-General, subject to the approval of the Conference, may enter into an appropriate agreement. The Members shall, in conformity with their international obligations, take the action necessary to give effect to any such agreement.

ARTICLE 88

International Character of the Responsibilities of the Director-General, Staff and Members of Commissions

1. The responsibilities of the Director-General and of the members of the Staff shall be exclusively international in character. In the discharge of their duties, they shall not seek or receive instructions from any government or from any other authority external to the Organisation. They shall refrain from any action which might reflect on their position as international officials.

2. The provisions of paragraph 1 shall also apply to the members of the Commissions.

3. The Members shall respect the international character of the responsibilities of these persons and shall not seek to influence them in the discharge of their duties.

ARTICLE 89

International Legal Status of the Organisation

The Organisation shall have legal personality and shall enjoy such legal capacity as may be necessary for the exercise of its functions.

ARTICLE 90

Status of the Organisation in the Territory of Members

1. The Organisation shall enjoy in the territory of each of its Members such legal capacity, privileges and immunities as may be necessary for the exercise of its functions.

2. The representatives of Members and the officials of the Organisation shall similarly enjoy such privileges and immunities as may be necessary for the independent exercise of their functions in connection with the Organisation.

3. When the Organisation has been brought into relationship with the United Nations as provided for in paragraph 1 of Article 86, the legal capacity of the Organisation and the privileges and immunities provided for in the preceding paragraphs shall be defined by the General Convention on Privileges and Immunities of the Specialised Agencies, adopted by the General Assembly of the United Nations, as from time to time amended, and as supplemented by an annex relating to the International Trade Organisation.

ARTICLE 91

Contributions

Each Member shall contribute promptly to the Organisation its share of the expenditure of the Organisation as apportioned by the Conference. A Member which is in arrears in the payment of its contributions shall have no vote in the organs of the Organisation, if the amount of its arrears equals or exceeds the amount of the contributions due from it in respect of the preceding two complete years. The Conference may, nevertheless, permit such a Member to vote, if it is satisfied that the failure to pay is due to circumstances beyond the control of the Member.

CHAPTER VIII

SETTLEMENT OF DIFFERENCES

ARTICLE 92

Reliance on the Procedures of the Charter

1. The Members undertake that they will not have recourse, in relation to other Members and to the Organisation, to any procedure other than the procedures envisaged in this Charter for complaints and the settlement of differences arising out of its operation.

2. The Members also undertake, without prejudice to any other international agreement, that they will not have recourse to unilateral economic measures of any kind contrary to the provisions of this Charter.

ARTICLE 93

Consultation and Arbitration

1. If any Member considers that any benefit accruing to it directly or indirectly, implicitly or explicitly, under any of the

provisions of this Charter other than Article 1, is being nullified or impaired as a result of

(*a*) a breach by a Member of an obligation under this Charter by action or failure to act, or

(*b*) the application by a Member of a measure not conflicting with the provisions of this Charter, or

(*c*) the existence of any other situation

the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to such other Member or Members as it considers to be concerned, and the Members receiving them shall give sympathetic consideration thereto.

2. The Members concerned may submit the matter arising under paragraph 1 to arbitration upon terms agreed between them; *Provided* that the decision of the arbitrator shall not be binding for any purpose upon the Organisation or upon any Member other than the Members participating in the arbitration.

3. The Members concerned shall inform the Organisation generally of the progress and outcome of any discussion, consultation or arbitration undertaken under this Charter.

ARTICLE 94

Reference to the Executive Board

1. Any matter arising under sub-paragraphs (*a*) or (*b*) of paragraph 1 of Article 93 which is not satisfactorily settled and any matter which arises under paragraph 1 (*c*) of Article 93 may be referred by any Member concerned to the Executive Board.

2. The Executive Board shall promptly investigate the matter and shall decide whether any nullification or impairment within the terms of paragraph 1 of Article 93 in fact exists. It shall then take such of the following steps as may be appropriate:

(*a*) decide that the matter does not call for any action;

(*b*) recommend further consultation to the Members concerned;

(*c*) refer the matter to arbitration upon such terms as may be agreed between the Executive Board and the Members concerned;

(*d*) in any matter arising under paragraph 1 (*a*) of Article 93, request the Member concerned to take such action as may be necessary for the Member to conform to the provisions of this Charter;

(*e*) in any matter arising under sub-paragraph (*b*) or (*c*) of paragraph 1 of Article 93, make such recommendations to Members as will best assist the Members concerned and contribute to a satisfactory adjustment.

3. If the Executive Board considers that action under sub-paragraphs (*d*) and (*e*) of paragraph 2 is not likely to be effective

in time to prevent serious injury, and that any nullification or impairment found to exist within the terms of paragraph 1 of Article 93 is sufficiently serious to justify such action, it may, subject to the provisions of paragraph 1 of Article 95, release the Member or Members affected from obligations or the grant of concessions to any other Member or Members under or pursuant to this Charter, to the extent and upon such conditions as it considers appropriate and compensatory, having regard to the benefit which has been nullified or impaired.

4. The Executive Board may, in the course of its investigation, consult with such Members or inter-governmental organisations upon such matters within the scope of this Charter as it deems appropriate. It may also consult any appropriate commission of the Organisation on any matter arising under this Chapter.

5. The Executive Board may bring any matter, referred to it under this Article, before the Conference at any time during its consideration of the matter.

Article 95

Reference to the Conference

1. The Executive Board shall, if requested to do so within thirty days by a Member concerned, refer to the Conference for review any action, decision or recommendation by the Executive Board under paragraphs 2 or 3 of Article 94. Unless such review has been asked for by a Member concerned, Members shall be entitled to act in accordance with any action, decision or recommendation of the Executive Board under paragraphs 2 or 3 of Article 94. The Conference shall confirm, modify or reverse such action, decision or recommendation referred to it under this paragraph.

2. Where a matter arising under this Chapter has been brought before the Conference by the Executive Board, the Conference shall follow the procedure set out in paragraph 2 of Article 94 for the Executive Board.

3. If the Conference considers that any nullification or impairment found to exist within the terms of paragraph 1 (*a*) of Article 93 is sufficiently serious to justify such action, it may release the Member or Members affected from obligations or the grant of concessions to any other Member or Members under or pursuant to this Charter, to the extent and upon such conditions as it considers appropriate and compensatory, having regard to the benefit which has been nullified or impaired. If the Conference considers that any nullification or impairment found to exist within the terms of sub-paragraphs (*b*) or (*c*) of paragraph 1 of Article 93 is sufficiently serious to justify such action, it may similarly release a Member or Members to the extent and upon such

conditions as will best assist the Members concerned and contribute to a satisfactory adjustment.

4. When any Member or Members, in accordance with the provisions of paragraph 3, suspend the performance of any obligation or the grant of any concession to another Member, the latter Member shall be free, not later than sixty days after such action is taken, or if an opinion has been requested from the International Court of Justice pursuant to the provisions of Article 96, after such opinion has been delivered, to give written notice of its withdrawal from the Organisation. Such withdrawal shall become effective upon the expiration of sixty days from the day on which such notice is received by the Director-General.

ARTICLE 96

Reference to the International Court of Justice

1. The Organisation may, in accordance with arrangements made pursuant to paragraph 2 of Article 96 of the Charter of the United Nations, request from the International Court of Justice advisory opinions on legal questions arising within the scope of the activities of the Organisation.

2. Any decision of the Conference under this Charter shall, at the instance of any Member whose interests are prejudiced by the decision, be subject to review by the International Court of Justice by means of a request, in appropriate form, for an advisory opinion pursuant to the Statute of the Court.

3. The request for an opinion shall be accompanied by a statement of the question upon which the opinion is required and by all documents likely to throw light upon the question. This statement shall be furnished by the Organisation in accordance with the Statute of the Court and after consultation with the Members substantially interested.

4. Pending the delivery of the opinion of the Court, the decision of the Conference shall have full force and effect; *Provided* that the Conference shall suspend the operation of any such decision pending the delivery of the opinion where, in the view of the Conference, damage difficult to repair would otherwise be caused to a Member concerned.

5. The Organisation shall consider itself bound by the opinion of the Court on any question referred by it to the Court. In so far as it does not accord with the opinion of the Court, the decision in question shall be modified.

ARTICLE 97

Miscellaneous Provisions

1. Nothing in this Chapter shall be construed to exclude other procedures provided for in this Charter for consultation and the

settlement of differences arising out of its operation. The Organisation may regard discussion, consultation or investigation undertaken under any other provisions of this Charter as fulfilling, either in whole or in part, any similar procedural requirement in this Chapter.

2. The Conference and the Executive Board shall establish such rules of procedure as may be necessary to carry out the provisions of this Chapter.

CHAPTER IX

GENERAL PROVISIONS

Article 98

Relations with Non-Members

1. Nothing in this Charter shall preclude any Member from maintaining economic relations with non-Members.

2. The Members recognise that it would be inconsistent with the purpose of this Charter for a Member to seek any arrangements with non-Members for the purpose of obtaining for the trade of its country preferential treatment as compared with the treatment accorded to the trade of other Member countries, or so to conduct its trade with non-Member countries as to result in injury to other Member countries. Accordingly,

(*a*) no Member shall enter into any new arrangement with a non-Member which precludes the non-Member from according to other Member countries any benefit provided for by such arrangement;

(*b*) subject to the provisions of Chapter IV, no Member shall accord to the trade of any non-Member country treatment which, being more favourable than that which it accords to the trade of any other Member country, would injure the economic interests of a Member country.

3. Notwithstanding the provisions of paragraph 2, Members may enter into agreements with non-Members in accordance with the provisions of paragraph 3 of Article 15 or of paragraph 6 of Article 44.

4. Nothing in this Charter shall be interpreted to require a Member to accord to non-Member countries treatment as favourable as that which it accords to Member countries under the provisions of the Charter, and failure to accord such treatment shall not be regarded as inconsistent with the terms or the spirit of the Charter.

5. The Executive Board shall make periodic studies of general problems arising out of the commercial relations between Member and non-Member countries and, with a view to promoting the

purpose of the Charter, may make recommendations to the Conference with respect to such relations. Any recommendation involving alterations in the provisions of this Article shall be dealt with in accordance with the provisions of Article 100.

ARTICLE 99

General Exceptions

1. Nothing in this Charter shall be construed
   (*a*) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or
   (*b*) to prevent a Member from taking, either singly or with other States, any action which it considers necessary for the protection of its essential security interests, where such action
      (i) relates to fissionable materials or to the materials from which they are derived, or
      (ii) relates to the traffic in arms, ammunition or implements of war, or to traffic in other goods and materials carried on directly or indirectly for the purpose of supplying a military establishment of the Member or of any other country, or
      (iii) is taken in time of war or other emergency in international relations; or
   (*c*) to prevent a Member from entering into or carrying out any inter-governmental agreement (or other agreement on behalf of a government for the purpose specified in this sub-paragraph) made by or for a military establishment for the purpose of meeting essential requirements of the national security of one or more of the participating countries; or
   (*d*) to prevent action taken in accordance with the provisions of Annex M to this Charter.
2. Nothing in this Charter shall be construed to override
   (*a*) any of the provisions of peace treaties or permanent settlements resulting from the Second World War which are or shall be in force and which are or shall be registered with the United Nations, or
   (*b*) any of the provisions of instruments creating Trust Territories or any other special regimes established by the United Nations.

ARTICLE 100

Amendments

1. Any amendment to this Charter which does not alter the obligations of Members shall become effective upon approval by the Conference by a two-thirds majority of the Members.

2. Any amendment which alters the obligations of Members shall, after receiving the approval of the Conference by a two-thirds majority of the Members present and voting, become effective for the Members accepting the amendment upon the ninetieth day after two-thirds of the Members have notified the Director-General of their acceptance, and thereafter for each remaining Member upon acceptance by it. The Conference may, in its decision approving an amendment under this paragraph and by one and the same vote, determine that the amendment is of such a nature that the Members which do not accept it within a specified period after the amendment becomes effective shall be suspended from membership in the Organisation; *Provided* that the Conference may, at any time, by a two-thirds majority of the Members present and voting, determine the conditions under which such suspension shall not apply with respect to any such Member.

3. A Member not accepting an amendment under paragraph 2 shall be free to withdraw from the Organisation at any time after the amendment has become effective; *Provided*, that the Director-General has received from such Member sixty days' written notice of withdrawal; and *provided further* that the withdrawal of any Member suspended under the provisions of paragraph 2 shall become effective upon the receipt by the Director-General of written notice of withdrawal.

4. The Conference shall, by a two-thirds majority of the Members present and voting, determine whether an amendment falls under paragraph 1 or paragraph 2, and shall establish rules with respect to the reinstatement of Members suspended under the provisions of paragraph 2, and any other rules required for carrying out the provisions of this Article.

5. The provisions of Chapter VIII may be amended within the limits and in accordance with the procedure set forth in Annex N.

ARTICLE 101

Review of the Charter

1. The Conference shall carry out a general review of the provisions of this Charter at a special session to be convened in conjunction with the regular annual session nearest the end of the fifth year after the entry into force of the Charter.

2. At least one year before the special session referred to in paragraph 1, the Director-General shall invite the Members to

submit any amendments or observations which they may wish to propose and shall circulate them for consideration by the Members.

3. Amendments resulting from such review shall become effective in accordance with the procedure set forth in Article 100.

ARTICLE 102

Withdrawal and Termination

1. Without prejudice to any special provision in this Charter relating to withdrawal, any Member may withdraw from the Organisation, either in respect of itself or of a separate customs territory on behalf of which it has accepted the Charter in accordance with the provisions of Article 104, at any time after three years from the day of the entry into force of the Charter.

2. A withdrawal under paragraph 1 shall become effective upon the expiration of six months from the day on which written notice of such withdrawal is received by the Director-General. The Director-General shall immediately notify all the Members of any notice of withdrawal which he may receive under this or other provisions of the Charter.

3. This Charter may be terminated at any time by agreement of three-fourths of the Members.

ARTICLE 103

Entry into Force and Registration

1. The government of each State accepting this Charter shall deposit an instrument of acceptance with the Secretary-General of the United Nations, who will inform all governments represented at the United Nations Conference on Trade and Employment and all Members of the United Nations not so represented of the date of deposit of each instrument of acceptance and of the day on which the Charter enters into force. Subject to the provisions of Annex O, after the entry into force of the Charter in accordance with the provisions of paragraph 2, each instrument of acceptance so deposited shall take effect on the sixtieth day following the day on which it is deposited.

2. (*a*) This Charter shall enter into force

(i) on the sixtieth day following the day on which a majority of the governments signing the Final Act of the United Nations Conference on Trade and Employment have deposited instruments of acceptance in accordance with the provisions of paragraph 1; or

(ii) if, at the end of one year from the date of signature of the said Final Act, it has not entered into force in accordance with the provisions of sub-paragraph (*a*) (i), then on the sixtieth day following the day on which the number of governments represented at the United

Nations Conference on Trade and Employment which have deposited instruments of acceptance in accordance with the provisions of paragraph 1 shall reach twenty; *Provided* that if twenty such governments have deposited acceptances more than sixty days before the end of such year, it shall not enter into force until the end of that year.

(*b*) If this Charter shall not have entered into force by September 30, 1949, the Secretary-General of the United Nations shall invite those governments which have deposited instruments of acceptance to enter into consultation to determine whether and on what conditions they desire to bring the Charter into force.

3. Until September 30, 1949, no State or separate customs territory, on behalf of which the said Final Act has been signed, shall be deemed to be a non-Member for the purposes of Article 98.

4. The Secretary-General of the United Nations is authorised to register this Charter as soon as it enters into force.

ARTICLE 104

Territorial Application

1. Each government accepting this Charter does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Organisation at the time of its own acceptance.

2. Any Member may at any time accept this Charter, in accordance with the provisions of paragraph 1 of Article 103, on behalf of any separate customs territory excepted under the provisions of paragraph 1.

3. Each Member shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Charter by the regional and local governments and authorities within its territory.

ARTICLE 105

Annexes

The Annexes to this Charter form an integral part thereof.

ARTICLE 106

Deposit and Authenticity of Texts

Title and Date of the Charter

1. The original texts of this Charter in the official languages of the United Nations shall be deposited with the Secretary-General of the United Nations, who will furnish certified copies of the texts to all interested governments. Subject to the provisions of the

Statute of the International Court of Justice, such texts shall be equally authoritative for the purposes of the interpretation of the Charter, and any discrepancy between texts shall be settled by the Conference.

2. The date of this Charter shall be March 24, 1948.

3. This Charter for an International Trade Organisation shall be known as the Havana Charter.

2

UNITED NATIONS MARITIME CONFERENCE

Geneva, March 6, 1948

Final Act

THE United Nations Maritime Conference was convened by the Economic and Social Council of the United Nations by the following resolution adopted on March 28, 1947:—

'The Economic and Social Council REQUESTS the Secretary-General:

(*a*) to convene a conference of interested Governments to consider the establishment of an inter-governmental maritime organisation. The Draft Convention prepared by the United Maritime Consultative Council on this matter, concerning the scope and the purpose of the proposed organisation, will serve as a working paper forming the basis of discussion for the Conference. The Conference will also consider if the scope and purposes of the Organisation should include the removal or prevention of unfair restrictive practices by shipping concerns;

(*b*) to circulate the above-mentioned Draft Convention to all the Governments invited to the Conference;

(*c*) to inform the Governments which are invited to the Conference that any comments which they wish to make on specific articles of the Draft Convention or amendments which they may wish to propose in advance of the Conference, should be submitted to the Secretary-General for circulation to all Governments participating in the Conference and for consideration by the Conference itself;

(*d*) to draw up a provisional agenda for the Conference, including the items mentioned above;

(*e*) to invite all the members of the United Nations and the following Governments to participate in the Conference:—

Albania, Austria, Bulgaria, Eire, Finland, Hungary, Italy, Portugal, Roumania, Switzerland, Transjordania, Yemen.

The Economic and Social Council EXPRESSES the hope that the Governments invited to the Conference may give their respective delegations full powers enabling them to sign such Convention on the establishment of an inter-governmental maritime organisation as may be concluded at the Conference.

The Economic and Social Council REQUESTS the Secretary-General to invite the specialised agencies, inter-governmental organisations and international organisations in this field, as may be appropriate, to send observers to the Conference. The Conference shall meet, if practicable, in the autumn of 1947, at a place to be determined by the Secretary-General after consultation with the President of the Council.'

The United Nations Maritime Conference met in the City of Geneva from February 19, 1948, to March 6, 1948.

The Governments of the following States were represented at the Conference by Delegations:—

Argentina.	India.
Australia.	Italy.
Brazil	Lebanon.
Belgium.	Netherlands.
Canada.	Norway.
Chile.	New Zealand.
China.	Pakistan.
Colombia.	Panama.
Czechoslovakia.	Poland.
Denmark.	Peru.
Dominican Republic.	Portugal.
Egypt.	Sweden.
Eire.	Switzerland.
Finland.	Turkey.
France.	United Kingdom.
Greece.	United States of America.

The Governments of the following States had observers at the conference:—

Cuba.	Iran.
Ecuador.	Union of South Africa.

The following organisations were represented by observers:—

A.—*Inter-Governmental Organisations*

International Labour Office.
World Health Organisation.
International Civil Aviation Organisation.
International Telecommunications Organisation.
International Meteorological Organisation.

B.—*Non-Governmental Organisations*

International Co-operative Alliance.
International Chamber of Commerce.
International Law Association.
International Transport Workers' Federation.

The Conference had before it and used as a basis for discussion the draft agreement for an inter-governmental maritime organisation prepared by the United Maritime Consultative Council. This document was submitted as a working paper for the Conference in accordance with the resolution adopted by the Economic and Social Council on March 28, 1947, at its fourth session, on the recommendation of its Transport and Communications Commission.

On the basis of its deliberations, as recorded in the records and reports of the respective committees, and of the plenary sessions, the Conference prepared and opened for signature and acceptance a Convention on the Inter-Governmental Maritime Consultative Organisation.

In addition the Conference adopted the following resolutions:—

1. A Resolution for the Establishment of a Preparatory Committee of the Inter-governmental Maritime Consultative Organisation;
   (Appended hereto as Annex 'A' to this Final Act).
2. A Resolution on the Safety of Life at Sea Conference;
   (Appended hereto as Annex 'B' to this Final Act).
3. A Resolution relating to the Report of the Preparatory Committee of Experts on Co-ordination of Safety at Sea and in the Air;
   (Appended hereto as Annex 'C' to this Final Act).

The Conference also approved the substance of a Draft Agreement on Relationships between the new Organisation and the United Nations (appended hereto as Annex 'D') and decided that it be used as a basis for negotiations by the Preparatory Committee with the United Nations in conformity with section 2 of the resolution establishing the Committee.

IN WITNESS WHEREOF the respective representatives have signed this Final Act:

Done in the City of Geneva this 6th day of March, 1948, in a single copy in the English, French and Spanish languages, each text being equally authentic. The original texts will be deposited with the Secretary-General of the United Nations who will send certified copies to each of the Governments invited to send representatives to the Conference.

[Here follow the signatures]

ANNEX 'A'

A Resolution on the Establishment of the Preparatory Committee of the Inter-Governmental Maritime Consultative Organisation

The United Nations Maritime Conference convened on February 19, 1948, in Geneva by the Economic and Social Council of the United Nations;

Having agreed that an international organisation to be known as the Inter-governmental Maritime Consultative Organisation shall be established, and

Having agreed upon a Convention for the Organisation,

Hereby resolves that a Preparatory Committee should be established,

And resolves, further, that :—

1. The Preparatory Committee of the Inter-governmental Maritime Consultative Organisation shall consist of representatives of the following twelve States : Argentine, Australia, Belgium, Canada, France, Greece, India, Netherlands, Norway, Sweden, the United Kingdom, and the United States of America.

2. The functions of the Preparatory Committee shall be :—

(*a*) to convene the first session of the Assembly of the Inter-governmental Maritime Consultative Organisation within three months from the date on which the Convention of the Organisation comes into force;

(*b*) to prepare and submit to the Governments represented at the United Nations Maritime Conference, and to any other Governments which have signed or accepted the Convention, at least six weeks before the first session of the Assembly of the Organisation, the provisional agenda for that session and necessary documents and recommendations relating thereto, including :—

(i) proposals for the implementation of the functions of the Organisation and a budget for the first two years of the Organisation,

(ii) draft rules of procedure,

(iii) draft financial and staff regulations;

(*c*) to suggest a scale of contributions by members to the budget of the Organisation;

(*d*) to prepare a draft annex to the General Convention on the Privileges and Immunities of the Specialised Agencies [1] in accordance with Part B of the Resolution adopted by the General Assembly of the United Nations on November 21, 1947, relating to this subject;

(*e*) to enter into negotiations with the United Nations with a view to the preparation of an agreement as

[1] 'Miscellaneous No. 6 (1946)', Cmd. 6753.

contemplated in Article 57 of the Charter of the United Nations [2] and in Article 45 of the Convention, using as a basis the draft agreement approved by the United Nations Maritime Conference.

In carrying out the functions of this section due consideration shall be given to the deliberations and decisions of the United Nations Maritime Conference.

3. The first meeting of the Preparatory Committee shall be held in Geneva immediately after the conclusion of this Conference.

4. The Preparatory Committee shall elect a chairman and adopt its own rules of procedure.

5. The expenses of the Preparatory Committee other than those of the members of the committee shall be met from funds which Governments may advance to the committee or from funds which may be loaned by the United Nations. The Preparatory Committee shall explore the feasibility of obtaining a loan from the United Nations and, if mutually acceptable, may enter into a loan agreement. The obligation under any such loan would be considered by the Governments represented at the Conference as a first claim for repayment by the Inter-governmental Maritime Consultative Organisation within the first two years of its existence. In the event of advances of funds to the Preparatory Committee from Governments, such advances may be set off against the contributions of the Governments concerned to the Organisation.

6. The Preparatory Committee may enter into agreement with the Secretary-General of the United Nations concerning the possible provision of personnel and other secretarial services under mutually satisfactory arrangements.

7. The Preparatory Committee shall cease to exist upon resolution of the First Session of the Assembly of the Inter-governmental Maritime Consultative Organisation.

ANNEX 'B'

A Draft Resolution on the Safety of Life at Sea Conference

WHEREAS

The United Nations Maritime Conference has approved a convention for the establishment of an inter-governmental maritime consultative organisation whose scope includes matters relating to maritime safety, and

WHEREAS

The conference for the purpose of revising the Convention on Safety of Life at Sea of 1929,[3] will be held in London in April, 1948, and

[2] 'Treaty Series No. 67 (1946)', Cmd. 7015.
[3] 'Treaty Series No. 34 (1932)', Cmd. 4198.

Whereas

The matters to be considered by the Safety of Life at Sea Conference fall within the field of responsibilities covered by the International Maritime Consultative Organisation Convention, The United Nations Maritime Conference

Recommends

That the Safety of Life at Sea Conference examine the convention on the Inter-governmental Maritime Consultative Organisation with a view to drafting provisions in its final acts which will take into account the duties and functions relating to maritime safety which have been accorded to the Inter-governmental Maritime Consultative Organisation.

ANNEX 'C'

A Resolution by the United States Delegation relating to the Report of the Preparatory Committee of Experts on Co-ordination of Safety at Sea and in the Air.

Whereas

Part VII of the Convention of the Inter-governmental Maritime Consultative Organisation places upon the Maritime Safety Committee the duty of co-ordinating its activities with those of other inter-governmental bodies in the field of transport and communications having an interest in maritime safety, and

Whereas

A special Preparatory Committee of Experts, representing inter-governmental organisations in the fields of aviation, meteorology, shipping and telecommunications, has recently met in London to consider principles for the co-ordination of activities in those four fields,

Whereas

The report of the Preparatory Committee (circulated to the Conference as Document E/Conf.4/8) will be considered at the forthcoming conference to revise the Convention for the Safety of Life at Sea, to be held in London in April, 1948.

Resolves

That this Conference direct its President to inform the Conference on Safety of Life at Sea that the conclusions contained in paragraph 21 of the Report of the Preparatory Committee of Experts were taken into consideration by this Conference when drafting Part VII of the Inter-governmental Maritime Consultative Organisation Convention which establishes the Maritime Safety Committee.

ANNEX 'D'

Draft Agreement on Relationship between the United Nations and the Inter-Governmental Maritime Consultative Organisation

Article 57 of the Charter of the United Nations (hereinafter called 'the Charter') provides that specialised agencies, established by inter-governmental agreement and having wide international responsibilities as defined in their basic instruments in economic, social, cultural, educational, health and related fields, shall be brought into relationship with the United Nations.

Part XII of the Convention on the Inter-governmental Maritime Consultative Organisation provides that the Inter-governmental Maritime Consultative Organisation (hereinafter called 'the Organisation') shall be brought into relationship with the United Nations as one of the specialised agencies referred to in Article 57 of the Charter of the United Nations.

Therefore the United Nations and the Organisation agree as follows :—

ARTICLE I

The United Nations recognises the Organisation as the specialised agency responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein.

ARTICLE II

Reciprocal Representation

1. The United Nations shall be invited to send representatives to attend the meetings of the Assembly of the Organisation, the Council, the Maritime Safety Committee, any subsidiary organs, and such conferences as the Organisation may convene, and to participate, without vote, in the deliberations of these bodies.

2. The Organisation shall be invited to send representatives to attend meetings of the Economic and Social Council of the United Nations and of its commissions and committees, and to participate, without vote, in the deliberations of these bodies, with respect to items on their agenda relating to matters within the scope of the activities of the Organisation.

3. The Organisation shall be invited to send representatives to attend meetings of the General Assembly of the United Nations for purposes of consultation on matters within the scope of the activities of the Organisation.

4. The Organisation shall be invited to send representatives to attend meetings of the main committees of the General Assembly when matters within the scope of its activities are under discussion and to participate, without vote, in such discussions.

5. The Organisation shall be invited to send representatives to attend the meetings of the Trusteeship Council and to participate, without vote, in the deliberations thereof with respect to items on the agenda relating to matters within the scope of its activities.

6. Written statements of the Organisation shall be distributed by the Secretariat of the United Nations to the members of the General Assembly, the Economic and Social Council and its commissions, and the Trusteeship Council as appropriate. Similarly, written statements presented by the United Nations shall be distributed as soon as possible by the Secretariat of the Organisation to all members of the Organisation.

Article III

Proposal of Agenda Items

Subject to such preliminary consultation as may be necessary, the Organisation shall include on the agenda of the Assembly, Council, and the Maritime Safety Committee, items proposed to it by the United Nations. Similarly, the Economic and Social Council and its commissions and the Trusteeship Council shall include on their provisional agenda items proposed by the Assembly or Council.

Article IV

Recommendations of the United Nations

1. The Organisation having regard to the obligation of the United Nations to promote the objectives set forth in Article 55 of the Charter and the functions and powers of the Economic and Social Council, under Article 62 of the Charter, to make or initiate studies and reports with respect to international economic, cultural, educational, health and related matters and to make recommendations concerning these matters to the specialised agencies concerned, and having regard also to the responsibility of the United Nations, under Articles 58 and 63 of the Charter, to make recommendations for the co-ordination of the policies and activities of such specialised agencies, agrees to arrange for the submission, as soon as possible to the Assembly or the Council, as appropriate, of all formal recommendations which the United Nations may make to it.

2. The Organisation agrees to enter into consultation with the United Nations upon request, with respect to such recommendations, and in due course to report to the United Nations on the action taken by the Organisation or by its members, to give effect to such recommendations, or on the other results of their consideration.

3. The Organisation affirms its intention of co-operating in whatever further measures may be necessary to make co-ordination of the policy and activities of specialised agencies and those of the

United Nations fully effective. In particular, it agrees to participate in, and to co-operate with any bodies which the Economic and Social Council has established or may establish for the purpose of facilitating such co-ordination and to furnish such information as may be required for the carrying out of this purpose.

ARTICLE V

Exchange of Information and Documents

1. Subject to such arrangements as may be necessary for the safeguarding of confidential material, the fullest and promptest exchange of appropriate information and documents shall be made between the United Nations and the Organisation.

2. Without prejudice to the generality of the provisions of paragraph 1—

(*a*) the Organisation agrees to transmit to the United Nations regular reports on the activities of the Organisation and programmes of operation for each ensuing year;

(*b*) the Organisation agrees to comply to the fullest extent practicable with any request which the United Nations may make for the furnishing of special reports, studies or information, subject to the conditions set forth in Article XV; and

(*c*) the Secretary-General of the United Nations shall upon request, consult with the Secretary-General of the Organisation regarding the provision to the Organisation of such information as may be of special interest to the Organisation.

ARTICLE VI

Assistance to the Security Council

The Organisation agrees to co-operate with the Economic and Social Council in furnishing such information and rendering such assistance to the Security Council as that Council may request, including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security.

ARTICLE VII

Assistance to the Trusteeship Council

The Organisation agrees to co-operate with the Trusteeship Council in the carrying out of its functions and in particular agrees that it will, to the greatest extent possible, render such assistance as the Trusteeship Council may request, in regard to matters with which the Organisation is concerned.

Article VIII

Non-Self-Governing Territories

The Organisation agrees to co-operate with the members of the United Nations concerned in giving effect to the principles and obligations set forth in Chapter XI of the Charter with regard to matters affecting the well-being and development of the peoples of non-self-governing territories.

Article IX

Relations with the International Court of Justice

1. The Organisation agrees to furnish any information which may be requested by the International Court of Justice in pursuance of Article 34 of the Statute of the Court.[4]

2. The General Assembly authorises the Organisation to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organisation and the United Nations or other specialised agencies.

3. Such request may be addressed to the Court by the Assembly, or by the Council acting in pursuance of an authorisation by the Assembly.

4. When requesting the International Court of Justice to give an advisory opinion, the Organisation shall inform the Economic and Social Council of the request.

Article X

Personnel Arrangements

1. The United Nations and the Organisation recognise that the eventual development of a single unified international civil service is desirable from the standpoint of effective administrative co-ordination, and, with this end in view, agree to develop common personnel standards, methods and arrangements designed to avoid serious discrepancies in terms and conditions of employment, to avoid competition in recruitment of personnel, and to facilitate interchange of personnel in order to obtain the maximum benefit from their services.

2. The United Nations and the Organisation agree to co-operate to the fullest extent possible in achieving these ends and in particular they agree to—

(*a*) participate in the International Civil Service Advisory Board established for the purpose of contributing to the improvement of recruitment and related phases of personnel administration in all of the international organisations;

[4] 'Treaty Series No. 67 (1946)', Cmd. 7015.

(*b*) consult together concerning other matters relating to the employment of their officers and staff, including conditions of service, duration of appointments, classification, salary scales and allowances, retirement and pension rights and staff regulations and rules with a view to securing as much uniformity in these matters as shall be found practicable;

(*c*) co-operate in the interchange of personnel, when desirable, on a temporary or permanent basis, making due provision for the retention of seniority and pension rights;

(*d*) co-operate in the establishment and operation of suitable machinery for the settlement of disputes arising in connection with the employment of personnel and related matters.

ARTICLE XI

Statistical Services

1. The United Nations and the Organisation agree to strive for maximum co-operation, the elimination of all undesirable duplication between them, and the most efficient use of their technical personnel in their respective collection, analysis, publication and dissemination of statistical information. They agree to combine their efforts to secure the greatest possible usefulness and utilisation of statistical information and to minimise the burdens placed upon national Governments and other organisations from which such information may be collected.

2. The Organisation recognises the United Nations as the central agency for the collection, analysis, publication, standardisation and improvement of statistics serving the general purposes of international organisations.

3. The United Nations recognises the Organisation as the appropriate agency for the collection, analysis, publication, standardisation and improvement of statistics within its special sphere, without prejudice to the right of the United Nations to concern itself with such statistics so far as they may be essential for its own purposes or for the improvement of statistics throughout the world.

4. It is recognised as desirable that the collection of statistical information should not be duplicated by the United Nations or any of the specialised agencies whenever it is practicable for any of them to utilise information or materials which another may have available.

5. In order to build up a central collection of statistical information for general use, it is agreed that data supplied to the Organisation for incorporation in its basic statistical series or special reports should, so far as practicable, be made available to the United Nations on request.

Article XII

Administrative and Technical Services

1. The United Nations and the Organisation recognise the desirability, in the interest of administrative and technical uniformity and of the most efficient use of personnel and resources, of avoiding, whenever possible, the establishment and operation of competitive or overlapping facilities and services among the United Nations and the specialised agencies.

2. Accordingly, the United Nations and the Organisation agree to consult together concerning the establishment and use of common administrative and technical services and facilities in addition to those referred to in Articles X, XI and XIII, in so far as the establishment and use of such services may from time to time be found practicable and appropriate.

3. Arrangements shall be made between the United Nations and the Organisation in regard to the registration and deposit of official documents.

4. Officials of the Organisation shall have the right to use the *laissez-passer* of the United Nations in accordance with special arrangements to be negotiated between the Secretary-General of the United Nations and the competent authorities of the Organisation.

Article XIII

Budgetary and Financial Arrangements

1. The Organisation recognises the desirability of establishing close budgetary and financial relationships with the United Nations in order that the administrative operations of the United Nations and of the specialised agencies shall be carried out in the most efficient and economical manner possible, and that the maximum measure of co-ordination and uniformity with respect to these operations shall be secured.

2. The following arrangements shall govern budgetary and financial relationships between the United Nations and the Organisation :—

(*a*) In the preparation of the budgetary estimates of the Organisation, the Secretariat of the Organisation shall consult with the Secretary-General of the United Nations with a view to achieving, in so far as practicable, uniformity in presentation of the budgets of the United Nations and of the specialised agencies for the purpose of providing a basis for comparison of the several budgets.

(*b*) The Organisation agrees to transmit its budget or budgetary estimates to the United Nations by July 1 of the preceding year or such other date as may be agreed upon by the United Nations and the Organisation. The General Assembly shall examine the budget or budgetary estimates

of the Organisation and may make recommendations to it concerning any item or items contained therein.

(*c*) Representatives of the Organisation shall be entitled to participate, without vote, in the deliberations of the General Assembly or any committee thereof or established by it at all times when the budget of the Organisation or general administrative or financial questions affecting the Organisation are under consideration.

(*d*) The United Nations may undertake the collection of contributions from those members of the Organisation which are also members of the United Nations in accordance with such arrangements as may be defined by a later agreement between the United Nations and the Organisation.

(*e*) The United Nations shall, upon its own initiative, or upon the request of the Organisation, arrange for studies to be undertaken concerning other financial and fiscal questions of interest to the Organisation and to other specialised agencies with a view to the provision of common services and the securing of uniformity in such matters.

(*f*) The Organisation agrees to conform, as far as may be practicable, to standard practices and forms recommended by the United Nations.

ARTICLE XIV

Financing of Special Services

1. In the event of the Organisation being faced with the necessity of incurring substantial extra expense as a result of any request which the United Nations may make for special reports, studies or assistance in accordance with Articles V, VI, or VII, or with other provisions of this Agreement, consultation shall take place with a view to determining the most equitable manner in which such expense shall be borne.

2. Consultation between the United Nations and the Organisation shall similarly take place with a view to making such arrangements as may be found equitable for covering the costs of central administrative, technical or fiscal services or facilities or other special assistance provided by the United Nations.

ARTICLE XV

Inter-Agency Agreements

The Organisation agrees to inform the Economic and Social Council of the nature and scope of any formal agreement contemplated and to notify the Council of the conclusion of any formal agreement between the Organisation and any other specialised agency, inter-governmental organisations, or non-governmental organisations.

Article XVI

Liaison

1. The United Nations and the Organisation agree to the foregoing provisions in the belief that they will contribute to the maintenance of effective liaison between the two organisations. They affirm their intention of taking whatever further measures may be necessary to make this liaison fully effective.

2. The liaison arrangements provided for in the foregoing articles of this Agreement apply as far as appropriate to the relations between such branch or regional offices as may be established by the two organisations as well as between their central machinery.

Article XVII

Implementation of the Agreement

The Secretary-General of the United Nations and the appropriate authority of the Organisation may enter into such supplementary arrangements for the implementation of this Agreement as may be found desirable.

Article XVIII

Revision

This Agreement shall be subject to revision by agreement between the United Nations and the Organisation.

Article XIX

Entry into Force

This Agreement shall come into force on its approval by the General Assembly of the United Nations and the Assembly of the Organisation.

Convention for the Establishment of the Inter-governmental Maritime Consultative Organisation

The States parties to the present Convention hereby establish the Inter-governmental Maritime Consultative Organisation (hereinafter referred to as 'the Organisation').

Part I—Purposes of the Organisation

ARTICLE 1

The purposes of the Organisation are :—

(*a*) to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation;

(*b*) to encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;

(*c*) to provide for the consideration by the Organisation of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II;

(*d*) to provide for the consideration by the Organisation of any matters concerning shipping that may be referred to it by any organ or specialised agency of the United Nations;

(*e*) to provide for the exchange of information among Governments on matters under consideration by the Organisation.

Part II—Functions

ARTICLE 2

The functions of the Organisation shall be consultative and advisory.

ARTICLE 3

In order to achieve the purposes set out in Part I, the functions of the Organisation shall be :—

(*a*) subject to the provisions of Article 4, to consider and make recommendations upon matters arising under Article 1 (*a*), (*b*) and (*c*) that may be remitted to it by members, by any organ or specialised agency of the United Nations or

by any other inter-governmental organisation or upon matters referred to it under Article 1 (*d*);

(*b*) to provide for the drafting of conventions, agreements, or other suitable instruments, and to recommend these to Governments and to inter-governmental organisations, and to convene such conferences as may be necessary;

(*c*) to provide machinery for consultation among members and the exchange of information among Governments.

Article 4

In those matters which appear to the Organisation capable of settlement through the normal processes of international shipping business the Organisation shall so recommend. When, in the opinion of the Organisation, any matter concerning unfair restrictive practices by shipping concerns is incapable of settlement through the normal processes of international shipping business, or has in fact so proved, and provided it shall first have been the subject of direct negotiations between the Members concerned, the Organisation shall, at the request of one of those members, consider the matter.

Part III—Membership

Article 5

Membership in the Organisation shall be open to all States, subject to the provisions of Part III.

Article 6

Members of the United Nations may become members of the Organisation by becoming parties to the Convention in accordance with the provisions of Article 57.

Article 7

States not members of the United Nations which have been invited to send representatives to the United Nations Maritime Conference convened in Geneva on Febuary 19, 1948, may become members by becoming parties to the Convention in accordance with the provisions of Article 57.

Article 8

Any State not entitled to become a member under Article 6 or 7 may apply through the Secretary-General of the Organisation to become a member and shall be admitted as a member upon its becoming a party to the Convention in accordance with the

provisions of Article 57, provided that, upon the recommendation of the Council, its application has been approved by two-thirds of the members other than associate-members.

ARTICLE 9

Any territory or group of territories to which the Convention has been made applicable under Article 58, by the member having responsibility for its international relations or by the United Nations, may become an associate-member of the Organisation by notification in writing given by such member or by the United Nations, as the case may be, to the Secretary-General of the United Nations.

ARTICLE 10

An associate-member shall have the rights and obligations of a member under the Convention except that it shall not have the right to vote in the Assembly or be eligible for membership on the Council or on the Maritime Safety Committee and subject to this the word 'member' in the Convention shall be deemed to include associate-member unless the context otherwise requires.

ARTICLE 11

No State or territory may become or remain a member of the Organisation contrary to a resolution of the General Assembly of the United Nations.

Part IV—Organs

ARTICLE 12

The Organisation shall consist of an Assembly, a Council, a Maritime Safety Committee, and such subsidiary organs as the Organisation may at any time consider necessary; and a Secretariat.

Part V—The Assembly

ARTICLE 13

The Assembly shall consist of all the members.

ARTICLE 14

Regular sessions of the Assembly shall take place once every two years. Extraordinary sessions shall be convened after a notice of sixty days whenever one-third of the members give notice to the Secretary-General that they desire a session to be arranged,

or at any time if deemed necessary by the Council, after a notice of sixty days.

Article 15

A majority of the members other than associate-members shall constitute a quorum for the meetings of the Assembly.

Article 16

The functions of the Assembly shall be—

(*a*) to elect at each regular session from among its members, other than associate-members, its President and two Vice-Presidents who shall hold office until the next regular session;

(*b*) to determine its own rules of procedure except as otherwise provided in the Convention;

(*c*) to establish any temporary or, upon recommendation of the Council, permanent subsidiary bodies it may consider to be necessary;

(*d*) to elect the members to be represented on the Council, as provided in Article 17, and on the Maritime Safety Committee as provided in Article 28;

(*e*) to receive and consider the reports of the Council, and to decide upon any question referred to it by the Council;

(*f*) to vote the budget and determine the financial arrangements of the Organisation, in accordance with Part IX;

(*g*) to review the expenditures and approve the accounts of the Organisation;

(*h*) to perform the functions of the Organisation, provided that in matters relating to Article 3 (*a*) and (*b*), the Assembly shall refer such matters to the Council for formulation by it of any recommendations or instruments thereon; provided further that any recommendations or instruments submitted to the Assembly by the Council and not accepted by the Assembly shall be referred back to the Council for further consideration with such observations as the Assembly may make;

(*i*) to recommend to members for adoption regulations concerning maritime safety, or amendments to such regulations, which have been referred to it by the Maritime Safety Committee through the Council;

(*j*) to refer to the Council for consideration or decision any matters within the scope of the Organisation, except that the function of making recommendations under paragraph (*i*) of this Article shall not be delegated.

Part VI—The Council

ARTICLE 17

The Council shall consist of sixteen members and shall be composed as follows :—

(*a*) six shall be Governments of the nations with the largest interest in providing international shipping services;

(*b*) six shall be Governments of other nations with the largest interest in international sea-borne trade;

(*c*) two shall be elected by the Assembly from among the Governments of nations having a substantial interest in providing international shipping services; and

(*d*) two shall be elected by the Assembly from among the Governments of nations having a substantial interest in international sea-borne trade.

In accordance with the principles set forth in this article the first Council shall be constituted as provided in Appendix I to the present Convention.

ARTICLE 18

Except as provided in Appendix I to the present Convention, the Council shall determine, for the purpose of Article 17 (*a*), the members, Governments of nations with the largest interest in providing international shipping services, and shall also determine, for the purpose of Article 17 (*c*), the members, Governments of nations having a substantial interest in providing such services. Such determinations shall be made by a majority vote of the Council, including the concurring votes of a majority of the members represented on the Council under Article 17 (*a*) and (*c*). The Council shall further determine, for the purpose of Article 17 (*b*), the members, Governments of nations with the largest interest in international sea-borne trade. Each Council shall make these determinations at a reasonable time before each regular session of the Assembly.

ARTICLE 19

Members represented on the Council in accordance with Article 17 shall hold office until the end of the next regular session of the Assembly. Members shall be eligible for re-election.

ARTICLE 20

(*a*) The Council shall elect its Chairman and adopt its own rules of procedure except as otherwise provided in the Convention.

(*b*) Twelve members of the Council shall constitute a quorum.

(*c*) The Council shall meet upon one month's notice as often as may be necessary for the efficient discharge of its duties upon the summons of its Chairman or upon request by not less than four of its members. It shall meet at such places as may be convenient.

Article 21

The Council shall invite any member to participate, without vote, in its deliberations on any matter of particular concern to that member.

Article 22

(*a*) The Council shall receive the recommendations and reports of the Maritime Safety Committee and shall transmit them to the Assembly and, when the Assembly is not in session, to the members for information, together with the comments and recommendations of the Council.

(*b*) Matters within the scope of Article 29 shall be considered by the Council only after obtaining the views of the Maritime Safety Committee thereon.

Article 23

The Council, with the approval of the Assembly, shall appoint the Secretary-General. The Council shall also make provision for the appointment of such other personnel as may be necessary, and determine the terms and conditions of service of the Secretary-General and other personnel, which terms and conditions shall conform as far as possible with those of the United Nations and its specialised agencies.

Article 24

The Council shall make a report to the Assembly at each regular session on the work of the Organisation since the previous regular session of the Assembly.

Article 25

The Council shall submit to the Assembly the budget estimates and the financial statements of the Organisation, together with its comments and recommendations.

Article 26

The Council may enter into agreements or arrangements covering the relationship of the Organisation with other organisations, as provided for in Part XII. Such agreements or arrangements shall be subject to approval by the Assembly.

Article 27

Between sessions of the Assembly, the Council shall perform all the functions of the Organisation, except the function of making recommendations under Article 16 (*i*).

Part VII—Maritime Safety Committee

ARTICLE 28

(*a*) The Maritime Safety Committee shall consist of 14 members elected by the Assembly from the members, Governments of those nations having an important interest in maritime safety, of which not less than 8 shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of members, Governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas.

(*b*) Members shall be elected for a term of 4 years and shall be eligible for re-election.

ARTICLE 29

(*a*) The Maritime Safety Committee shall have the duty of considering any matter within the scope of the Organisation and concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log-books and navigational records, marine casualty investigation, salvage and rescue, and any other matters directly affecting maritime safety.

(*b*) The Maritime Safety Committee shall provide machinery for performing any duties assigned to it by the Convention, or by the Assembly, or any duty within the scope of this article which may be assigned to it by any other inter-governmental instrument.

(*c*) Having regard to the provisions of Part XII, the Maritime Safety Committee shall have the duty of maintaining such close relationship with other inter-governmental bodies concerned with transport and communications as may further the object of the Organisation in promoting maritime safety and facilitate the co-ordination of activities in the fields of shipping, aviation, telecommunications and meteorology with respect to safety and rescue.

ARTICLE 30

The Maritime Safety Committee, through the Council, shall—

(*a*) submit to the Assembly at its regular sessions proposals made by members for safety regulations or for amendments to existing safety regulations, together with its comments or recommendations thereon;

(*b*) report to the Assembly on the work of the Maritime Safety Committee since the previous regular session of the Assembly.

Article 31

The Maritime Safety Committee shall meet once a year and at other times upon request of any five of its members. It shall elect its officers once a year and shall adopt its own rules of procedure. A majority of its members shall constitute a quorum.

Article 32

The Maritime Safety Committee shall invite any member to participate, without vote, in its deliberations on any matter of particular concern to that member.

Part VIII—The Secretariat

Article 33

The Secretariat shall comprise the Secretary-General, a Secretary of the Maritime Safety Committee and such staff as the Organisation may require. The Secretary-General shall be the chief administrative officer of the Organisation, and shall, subject to the provisions of Article 23, appoint the above-mentioned personnel.

Article 34

The Secretariat shall maintain all such records as may be necessary for the efficient discharge of the functions of the Organisation and shall prepare, collect and circulate the papers, documents, agenda, minutes and information that may be required for the work of the Assembly, the Council, the Maritime Safety Committee, and such subsidiary organs as the Organisation may establish.

Article 35

The Secretary-General shall prepare and submit to the Council the financial statements for each year and the budget estimates on a biennial basis, with the estimates for each year shown separately.

Article 36

The Secretary-General shall keep members informed with respect to the activities of the Organisation. Each member may appoint one or more representatives for the purpose of communication with the Secretary-General.

ARTICLE 37

In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government or from any authority external to the Organisation. They shall refrain from any action which might reflect on their position as international officials. Each member on its part undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

ARTICLE 38

The Secretary-General shall perform such other tasks as may be assigned to him by the Convention, the Assembly, the Council and the Maritime Safety Committee.

Part IX—Finances

ARTICLE 39

Each member shall bear the salary, travel and other expenses of its own delegation to the Assembly and of its representatives on the Council, the Maritime Safety Committee, other committees and subsidiary bodies.

ARTICLE 40

The Council shall consider the financial statements and budget estimates prepared by the Secretary-General and submit them to the Assembly with its comments and recommendations.

ARTICLE 41

(*a*) Subject to any agreement between the Organisation and the United Nations, the Assembly shall review and approve the budget estimates.

(*b*) The Assembly shall apportion the expenses among the members in accordance with a scale to be fixed by it after consideration of the proposals of the Council thereon.

ARTICLE 42

Any member which fails to discharge its financial obligation to the Organisation within one year from the date on which it is due shall have no vote in the Assembly, the Council, or the Maritime Safety Committee unless the Assembly, at its discretion, waives this provision.

Part X—Voting

Article 43

The following provisions shall apply to voting in the Assembly, the Council and the Maritime Safety Committee :—

(*a*) Each member shall have one vote.

(*b*) Except as otherwise provided in the Convention or in any international agreement which confers functions on the Assembly, the Council, or the Maritime Safety Committee, decisions of these organs shall be by a majority vote of the members present and voting and, for decisions where a two-thirds majority vote is required, by a two-thirds majority vote of those present.

(*c*) For the purpose of the Convention, the phrase ' members present and voting ' means ' members present and casting an affirmative or negative vote '. Members which abstain from voting shall be considered as not voting.

Part XI—Headquarters of the Organisation

Article 44

(*a*) The headquarters of the Organisation shall be established in London.

(*b*) The Assembly may by a two-thirds majority vote change the site of the headquarters if necessary.

(*c*) The Assembly may hold sessions in any place other than the headquarters if the Council deems it necessary.

Part XII—Relationship with the United Nations and other Organisations

Article 45

The Organisation shall be brought into relationship with the United Nations in accordance with Article 57 of the Charter of the United Nations as the specialised agency in the field of shipping. This relationship shall be effected through an agreement with the United Nations under Article 63 of the Charter of the United Nations, which agreement shall be concluded as provided in Article 26.

ARTICLE 46

The Organisation shall co-operate with any specialised agency of the United Nations in matters which may be the common concern of the Organisation and of such specialised agency, and shall consider such matters and act with respect to them in accord with such specialised agency.

ARTICLE 47

The Organisation may, on matters within its scope, co-operate with other inter-governmental organisations which are not specialised agencies of the United Nations, but whose interests and activities are related to the purposes of the Organisation.

ARTICLE 48

The Organisation may, on matters within its scope, make suitable arrangements for consultation and co-operation with non-governmental international organisations.

ARTICLE 49

Subject to approval by a two-thirds majority vote of the Assembly, the Organisation may take over from any other international organisations, governmental or non-governmental, such functions, resources and obligations within the scope of the Organisation as may be transferred to the Organisation by international agreements or by mutually acceptable arrangements entered into between competent authorities of the respective organisations. Similarly, the Organisation may take over any administrative functions which are within its scope and which have been entrusted to a Government under the terms of any international instrument.

Part XIII—Legal Capacity, Privileges and Immunities

ARTICLE 50

The legal capacity, privileges and immunities to be accorded to, or in connection with, the Organisation shall be derived from and governed by the General Convention on the Privileges and Immunities of the Specialised Agencies approved by the General Assembly of the United Nations on November 21, 1947, subject to such modifications as may be set forth in the final (or revised) text of

the Annex approved by the Organisation in accordance with Sections 36 and 38 of the said General Convention.

Article 51

Pending its accession to the said General Convention in respect of the Organisation, each member undertakes to apply the provisions of Appendix II to the present Convention.

Part XIV—Amendments

Article 52

Texts of proposed amendments to the Convention shall be communicated by the Secretary-General to members at least six months in advance of their consideration by the Assembly. Amendments shall be adopted by a two-thirds majority vote of the Assembly, including the concurring votes of a majority of the members represented on the Council. Twelve months after its acceptance by two-thirds of the members of the Organisation, other than associate-members, each amendment shall come into force for all members except those which, before it comes into force, make a declaration that they do not accept the amendment. The Assembly may by a two-thirds majority vote determine at the time of its adoption that an amendment is of such a nature that any member which has made such a declaration and which does not accept the amendment within a period of twelve months after the amendment comes into force shall, upon the expiration of this period, cease to be a party to the Convention.

Article 53

Any amendment adopted under Article 52 shall be deposited with the Secretary-General of the United Nations, who will immediately forward a copy of the amendment to all members.

Article 54

A declaration or acceptance under Article 52 shall be made by the communication of an instrument to the Secretary-General for deposit with the Secretary-General of the United Nations. The Secretary-General will notify members of the receipt of any such instrument and of the date when the amendment enters into force.

Part XV—Interpretation

ARTICLE 55

Any question or dispute concerning the interpretation or application of the Convention shall be referred for settlement to the Assembly, or shall be settled in such other manner as the parties to the dispute agree. Nothing in this article shall preclude the Council or the Maritime Safety Committee from settling any such question or dispute that may arise during the exercise of their functions.

ARTICLE 56

Any legal question which cannot be settled as provided in Article 55 shall be referred by the Organisation to the International Court of Justice for an advisory opinion in accordance with Article 96 of the Charter of the United Nations.

Part XVI—Miscellaneous Provisions

ARTICLE 57

Signature and Acceptance

Subject to the provisions of Part III the present Convention shall remain open for signature or acceptance and States may become parties to the Convention by :—

(*a*) signature without reservation as to acceptance;

(*b*) signature subject to acceptance followed by acceptance; or

(*c*) acceptance.

Acceptance shall be effected by the deposit of an instrument with the Secretary-General of the United Nations.

ARTICLE 58

Territories

(*a*) Members may make a declaration at any time that their participation in the Convention includes all or a group or a single one of the territories for whose international relations they are responsible.

(*b*) The Convention does not apply to territories for whose international relations members are responsible unless a declaration to that effect has been made on their behalf under the provisions of paragraph (*a*) of this article.

(*c*) A declaration made under paragraph (*a*) of this article shall be communicated to the Secretary-General of the United

Nations and a copy of it will be forwarded by him to all States invited to the United Nations Maritime Conference and to such other States as may have become members.

(*d*) In cases where under a trusteeship agreement the United Nations is the administering authority, the United Nations may accept the Convention on behalf of one, several, or all of the trust territories in accordance with the procedure set forth in Article 57.

Article 59

Withdrawal

(*a*) Any member may withdraw from the Organisation by written notification given to the Secretary-General of the United Nations, who will immediately inform the other members and the Secretary-General of the Organisation of such notification. Notification of withdrawal may be given at any time after the expiration of 12 months from the date on which the Convention has come into force. The withdrawal shall take effect upon the expiration of 12 months from the date on which such written notification is received by the Secretary-General of the United Nations.

(*b*) The application of the Convention to a territory or group of territories under Article 58 may at any time be terminated by written notification given to the Secretary-General of the United Nations by the member responsible for its international relations or, in the case of a trust territory of which the United Nations is the administering authority, by the United Nations. The Secretary-General of the United Nations will immediately inform all members and the Secretary-General of the Organisation of such notification. The notification shall take effect upon the expiration of 12 months from the date on which it is received by the Secretary-General of the United Nations.

Part XVII—Entry into Force

Article 60

The present Convention shall enter into force on the date when 21 States, of which 7 shall each have a total tonnage of not less than one million gross tons of shipping, have become parties to the Convention in accordance with Article 57.

Article 61

The Secretary-General of the United Nations will inform all States invited to the United Nations Maritime Conference and such other States as may have become members, of the date when each

State becomes party to the Convention, and also of the date on which the Convention enters into force.

ARTICLE 62

The present Convention, of which the English, French and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who will transmit certified copies thereof to each of the States invited to the United Nations Maritime Conference and to such other States as may have become members.

ARTICLE 63

The United Nations is authorised to effect registration of the Convention as soon as it comes into force.

IN WITNESS WHEREOF the undersigned being duly authorised by their respective Governments for that purpose have signed the present Convention.

Done at Geneva this 6th day of March, 1948.

[Here follow the signatures]

APPENDIX I

(Referred to in Article 17)

Composition of the First Council

In accordance with the principles set forth in Article 17 the first Council shall be constituted as follows :—

(*a*) The six members under Article 17 (*a*) being—

Greece.	Sweden.
Netherlands.	United Kingdom.
Norway.	United States.

(*b*) The six members under Article 17 (*b*) being—

Argentina.	Canada.
Australia.	France.
Belgium.	India.

(*c*) Two members to be elected by the Assembly under Article 17 (*c*) from a panel nominated by the six members named in paragraph (*a*) of this Appendix.

(*d*) Two members elected by the Assembly under Article 17 (*d*) from among the members having a substantial interest in international sea-borne trade.

Appendix II

(Referred to in Article 51)

Legal Capacity, Privileges and Immunities

The following provisions on legal capacity, privileges and immunities shall be applied by members to, or in connexion with, the Organisation pending their accession to the General Convention on Privileges and Immunities of Specialised Agencies in respect of the Organisation :

Section 1

The Organisation shall enjoy in the territory of each of its members such legal capacity as is necessary for the fulfilment of its purposes and the exercise of its functions.

Section 2

(*a*) The Organisation shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes and the exercise of its functions.

(*b*) Representatives of members, including alternates and advisers and officials and employees of the Organisation, shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organisation.

Section 3

In applying the provisions of Sections 1 and 2 of this Appendix, the members shall take into account as far as possible the standard clauses of the General Convention on the Privileges and Immunities of the Specialised Agencies.

3

RESOLUTION No. 1 OF THE FREEDOM OF INFORMATION CONFERENCE, GENEVA, APRIL, 1948

WHEREAS

Freedom of information is a fundamental right of the people, and is the touchstone of all the freedoms to which the United Nations is dedicated, without which world peace cannot well be preserved; and

Freedom of information carries the right to gather, transmit, and disseminate news anywhere and everywhere without fetters; and

Freedom of information depends for its validity upon the availability to the people of a diversity of sources of news and of opinion; and

Freedom of information further depends upon the willingness of the press and other agencies of information to employ the privileges derived from the people without abuse, and to accept and comply with the obligation to seek the facts without prejudice and to spread knowledge without malicious intent; and

Freedom of information further depends upon the effective enforcement of recognised responsibilities,

THE UNITED NATIONS CONFERENCE ON FREEDOM OF INFORMATION RESOLVES, THEREFORE,

1. That everyone shall have the right to freedom of thought and expression: this shall include freedom to hold opinions without interference; and to seek, receive and impart information and ideas by any means and regardless of frontiers;

2. That the right of news personnel to have the widest possible access to the sources of information, to travel unhampered in pursuit thereof, and to transmit copy without unreasonable or discriminatory limitations, should be guaranteed by action on the national and international plane;

3. That the exercise of these rights should be limited only by recognition of and respect for the rights of others, and the protection afforded by law to the freedom, welfare, and security of all;

4. That in order to prevent abuses of freedom of information, governments in so far as they are able should support measures which will help to improve the quality of information and to make a diversity of news and opinion available to the people;

5. That it is the moral obligation of the press and other agencies of information to seek the truth and report the facts, thereby contributing to the solution of the world's problems through the

free interchange of information bearing on them, promoting respect for human rights and fundamental freedoms without discrimination, fostering understanding and co-operation between peoples, and helping maintain international peace and security;

6. That this moral obligation, under the spur of public opinion, can be advanced through organisations and associations of journalists and through individual news personnel;

7. That encouragement should be given to the establishment and to the functioning within the territory of a State of one or more non-official organisations of persons employed in the collection and dissemination of information to the public, and that such organisation or organisations should encourage the fulfilment *inter alia* of the following obligations by all individuals or organisations engaged in the collection and dissemination of information :

(*a*) to report facts without prejudice and in their proper context and to make comments without malicious intent;

(*b*) to facilitate the solution of the economic, social and humanitarian problems of the world as a whole through the free interchange of information bearing on such problems;

(*c*) to help promote respect for human rights and fundamental freedoms without discrimination;

(*d*) to help maintain international peace and security;

(*e*) to counteract the spreading of intentionally false or distorted reports which promote hatred or prejudice against States, persons or groups of different race, language, religion or philosophical conviction;

8. That observance of the obligations of the press and other agencies of information, except those of a recognised legal nature, can also be effectively advanced by the people served by these instrumentalities, provided that news and opinion reach them through a diversity of sources and that the people have adequate means of obtaining and promoting a better performance from the press and other agencies of information.

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